Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

**KERRY L. MALTBY,**

*Petitioner,*

v.

**MARTY WINSTON, WEST CENTRAL ILLINOIS TASK FORCE, and DEWAYNE BOND, Sheriff of Schuyler County,**

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Plaintiff filed a civil rights suit for his arrest and 60 days of incarceration based on a violation of his Fourth Amendment constitutional rights and 42 U.S.C. 1983. Plaintiff's arrest was based on the Defendant's belief Plaintiff was a suspect the Defendant saw briefly as the suspect left the scene of an undercover transaction. The Defendant did not check his belief with a fellow officer, who observed the suspect face-to-face during the entirety of the undercover transaction prior to the Plaintiff's arrest, which occurred approximately nine weeks after the transaction. Shortly after the transaction, the informant who arranged it was accused of misconduct in another case and disappeared. The jury was instructed on qualified immunity, found for the Plaintiff and the trial judge entered judgment for the Plaintiff. The questions presented are:

1. Whether a court of appeals can review *de novo* as pure question of law without any deference, the jury and trial judge's application of the standard set for in the case of *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), which imposes liability if a reasonably well-trained police officer in the officer's position would have known his request for a warrant failed to establish probable cause and he should not have applied for it, to the facts of the case, which was made after a lengthy trial.

2. Whether the appellate court properly considered all relevant precedent as required by *Elder v. Holloway*, ____ U.S. ____, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) in reaching its determination that the officer's conduct did not violate clearly established probable cause law in 1987 and that the officer was entitled to judgment in his favor on the basis of qualified immunity as a matter of law.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Kerry L. Maltby respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals (App., infra., 1-32) is reported at 36 F.3d 548. The opinions of the District Court (App., infra, 34-43 and 47-68) are unreported.

## JURISDICTIONAL STATEMENT

The Seventh Circuit Court of Appeals entered its judgment on September 14, 1994. A timely petition for rehearing was denied on November 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provide in pertinent part:

**U.S. Const. amend. IV.** "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

**U.S. Const. amend. VII.** In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

**42 U.S.C. 1983. Civil action for deprivation of rights.** Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Consti-

tution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ."

**42 U.S.C. 1988. (b) Attorney's fees.** In any action or proceeding to enforce a provision of sections . . . 1983, . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

## STATEMENT OF THE CASE

### A. Overview

The Plaintiff, Kerry Maltby, (hereinafter Maltby) filed a civil rights suit for his arrest and incarceration based on a violation of his Fourth Amendment constitutional rights and 42 U.S.C. 1983 and 1988. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. Section 1331 (general federal jurisdiction question) because the action was based upon 42 U.S.C. 1983 and 1988. The appellate court's jurisdiction over the district court's entry of judgment against Winston, the denial of his post trial motion and the allowance of Maltby's attorney's fees and costs was invoked pursuant to 28 U.S.C. 1291.

On June 4, 1987, an informant, Anthony Hankins (hereinafter Hankins) arranged an undercover transaction in the parking lot of the Rushville, Illinois Dairy Queen, which led to the sale of 1.1 grams of a substance which purported to be LSD. In actuality, the substance was not a controlled substance (T. at 45). The transaction was overseen by the West Central Illinois Drug Task Force (hereinafter Task Force). Michael Sage (hereinafter Sage) served as a Task Force officer and made the purchase from the suspect (T. at 159-63). The transaction lasted 13 minutes (T. at 160). The Defendant, Marty Winston, (hereinafter Winston) served as a Task Force officer and provided surveillance for the transaction (T. at 564). The suspect drove past Winston's position at a distance of about 30 feet as the suspect left the scene

(T. at 127). The suspect's car was travelling at 15 to 20 mph when it passed Winston (T. at 134).

A few days after the Dairy Queen transaction, Hankins was accused of misconduct in his role as an informant (T. at 168-71). The misconduct involved another suspect, Chestnut, with whom Hankins had arranged earlier marijuana purchases by the Task Force. Chestnut offered to sell Sage LSD which was packaged the same as the substance Sage purchased in the Dairy Queen transaction and in another transaction set up by Hankins (T. at 168-9, 189, 206). When Sage declined the offer, Chestnut told Sage Hankins had asked Chestnut to sell the substance and that Hankins intended for Chestnut to split the money he received with Hankins (T. at 170). Hankins disappeared after Winston confronted Hankins with that information and was not seen again until February of 1988 (T. at 50-3, 55-7). Hankins failed to make contact with Winston after Hankins disappeared, which was a violation of Winston's instructions to Hankins regarding his duties as an informant (T. at 59). Criminal charges were filed against Hankins and a warrant was issued for his arrest on July 20, 1987 (T. at 107-9). His status as an informant was terminated on July 21, 1987 (T. at 106).

On August 6, 1987, Winston sought a warrant for Maltby's arrest for the sale of a look-alike substance based on the Dairy Queen transaction (T. at 564). Winston's decision to seek an arrest warrant was based partially on the fact Maltby refused to serve as an informant when he was interviewed by Winston approximately one week prior to Maltby's arrest (T. at 23, 65). Maltby was arrested on August 7, 1987 based on the warrant sought by Winston and held in jail until October 6, 1987 (T. at 565). Maltby was released from jail the day fellow Task Force officer Sage, who viewed the suspect face-to-face for the entirety of the 13 minute Dairy Queen transaction, visited the jail to

view Maltby (T. at 150). After 3 seconds, Sage said "wrong man" (T. at 150-1). Winston turned pale in response (T. at 154). Winston had never checked his identification of Maltby as the suspect with Sage until the day of Maltby's release from jail (T. at 26, 180). Initially that day, Winston had asked Sage to identify a photograph of Maltby because he wasn't "pleading out" (T. at 149). At trial, Winston, other police officers, and Maltby's expert testified about the need for a police officer to consult with all available witnesses. (See *Omitted Facts*, Section 6 infra).

**B. Proceedings Below**

**1. Trial court**. Prior to trial, Winston filed a Motion for Summary Judgment on the issue of qualified immunity, a Motion to Reconsider the denial of his summary judgment motion and joined in a Joint Motion to Reconsider filed by all defendants. All motions were denied by the trial court on basis that there were material issues of fact (See App. 47 at 53-56 and 60-63). Winston moved for a directed verdict on the issue of qualified immunity at the end of four days of testimony in the liability phase of the bifurcated jury trial. Winston's motion was denied on the basis that questions of fact on the issue existed (App. 66-67), and the jury was instructed on the law of probable cause and the issue of qualified immunity. The qualified immunity instruction was drawn from *Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271, 281 (1986) and stated as follows:

> "The issue of a warrant for plaintiff's arrest protects Defendants from liability unless a reasonably, well-trained police officer in Winston's position would have known that his affidavit or testimony failed to establish probable cause, and that he should not have applied for the warrant." (T. at 693-4 Court's Inst. No. 1., R. Doc. 224).

The jury found in favor of Maltby and against Winston on the issue of liability and awarded Maltby $50,000 for com-

pensatory damages and $2,300 for punitive damages. Winston's oral and written post trial motions for judgment as a matter of law on the issue of qualified immunity were denied (See App. 67-68). After trial, the court awarded $74,086.24 for Maltby's attorney's fees and costs.

**2. Appellate court.** The appellate court applied a *de novo* standard of review, found Winston was entitled to qualified immunity, and reversed the jury verdicts and the award of attorney's fees and costs. The appellate court acknowledged its *de novo* standard of review was in conflict with other Seventh Circuit unconstitutional arrest cases on the issue. 36 F.3d at 555-556 n.7. For example, see *Mahoney v. Kesery*, 976 F.2d 1054, 1059 (7th Cir. 1992) which applied a clear error standard of review to qualified immunity.

The appellate court held, without reference to the jury's verdict or the trial judge's denial of Winston's motion for judgment that Winston was entitled to qualified immunity as a matter of law. The appellate court summarized its reasoning for doing so as follows:

> "An officer who had witnessed a purported drug transaction and who had made an identification of the seller could easily rationalize the shortcomings of the evidence; such a lapse at most reveals a mistake in judgment. The Supreme Court has stated: 'The qualified immunity standard "gives ample room for mistakes in judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law" 36 F.3d at 557.

The appellate court went on to hold as follows:

> "Thus, we believe that a reasonable officer in Inspector Winston's position, looking at our case-law on probable cause generally, could have concluded that Mr. Maltby committed the crime. Consequently, Inspector Winston is entitled to qualified immunity." 36 F.3d at 558.

The appellate court's *de novo* analysis was not limited to a review of the clearly established law. The appellate court, in essence, retried *de novo*, the jury and trial judge's determinations to place Winston outside the realm of a "reasonably well-trained police officer" based on their application of the law to the facts and decided, based on its *de novo* retrial of the facts, that Winston's actions represented a "mere mistake in judgment" which placed him inside the qualified immunity safe harbor from liability. In reaching its decision, the appellate court identified the following facts it believed could lead a reasonable police officer to believe Maltby was the suspect in the Dairy Queen transaction:

> "Hankins' identification, prior to the Dairy Queen incident, that the man selling the drugs would be Kerry Maltby; Hankins' information that the seller would be arriving in a brown Ford; Inspector Winston's observations of a male parked in a brown Ford in the Dairy Queen parking lot; Hankins' introduction of the man in the Ford as "Kerry"; Inspector Winston's observation of the undercover purchase; Inspector Winston's observation of the man in the Ford driving past his surveillance position; Inspector Sage's report of purchasing 1.1 grams of LSD from Kerry Maltby; and Inspector Winston's viewing of Maltby face-to-face after the incident." 36 F.3d at 556.

The appellate court also recognized other facts which undermined the belief Maltby was the man at the Dairy Queen:

> "First, Hankins . . . left town after being confronted with information he was engaged in illegal activity. Second, the brown Ford was not registered to Mr. Maltby but to a Virgil Riley. Finally, when Mr. Maltby was questioned about the incident, he denied all knowledge of the transaction." 36 F.3d at 556, 557.

**C. Omitted Facts**

In reaching its decision, the appellate court disregarded a great deal of facts introduced at trial which contradicted

the facts the appellate court relied on or which favored Maltby and were not mentioned. Maltby will briefly summarize several categories of undisputed facts germane to the issue of qualified immunity which were omitted by the appellate court.

**1. Informant information.** Hankins was implicated in three Task Force undercover drug purchases in late 1986 and early 1987 and agreed to become an informant in the hope of receiving lesser punishment for his offenses (T. at 29-30). Hankins did not provide a street address or phone number for the Dairy Queen suspect or tell Winston how long he had known "Maltby" or how Hankins was able to set up the purchase (T. at 35-6). Hankins billed the Dairy Queen transaction as a drug purchase rather than a look-alike transaction (T. at 36). Purchases in two other transactions Hankins set up near the time of the Dairy Queen transaction were supposed to be controlled substances but both turned out to be look-alike substances (T. at 60, 106-7, 132-3). The Task Force investigated no look-alike cases in 1985, one in 1986, and two in 1987, not including the Dairy Queen transaction. (T. at 431).

**2. Winston's view.** Winston had never seen the suspect before, did not use anything to enhance his vision during the transaction, and could not actually see the suspected controlled substance or the money for the substance change hands during the transaction (T. at 22-3, 44-5). The suspect turned his face toward Sage during most of the transaction (T. at 162). Winston could not determine how tall the suspect was, his weight or see the full length of his arms (T. at 48). The suspect never used a name or identified himself (T. at 163).

**3. Vehicle registration.** Winston's Task Force supervisor, Illinois State Police, Department of Criminal Investigations, (DCI) Sergeant Kempf told Winston to follow up on the variance between the registration of the car used in the

Dairy Queen transaction and the name "Kerry Maltby" (T. at 245). Winston did not do so (T. at 54). DCI had written intelligence files, which were available to Task Force officers (T. at 370-1). Agents rely on these files and should check them when a name comes up to see if a file exists (T. at 370-1). DCI had an intelligence report dated February 5, 1987 which indicted Virgil Riley and other members of his family grew and sold cannabis in the Beardstown area (T. at 439-41). During the Dairy Queen transaction, the suspect told Sage the suspect was growing marijuana plants in the Beardstown area that he would harvest later (T. at 164-5).

**4. Post-arrest actions.** After Maltby's preliminary hearing, the State's Attorney instructed Winston to verify Maltby's identification, which Winston agreed to do (T. at 394-6, 405). The State's Attorney and Sergeant Kempf told Winston to follow up on the alibi information Maltby's defense attorney provided to the State's Attorney and question the alibi witnesses (T. at 256-7, 532-3). After several follow-up requests for information by the State's Attorney, Winston spoke with the alibi witnesses in the general time of when Maltby was released (T. at 121, 533-5, 537-8).

**5. Sage's viewing of Maltby.** Winston saw Sage on a weekly basis and frequently on a daily basis from June 1987 until the time of Maltby's release, except for a brief vacation Sage took (T. at 24-5). The day of Maltby's release was the first time the State's Attorney was advised by Winston that Sage had not previously viewed Maltby (T. at 514-5, 540). Upon learning this and that Sage wanted to view Maltby in person, the State's Attorney instructed Winston and Sage to go to the jail to do so and call her as soon as they did, even if she were at home (T. at 539-540, 548). Sage based his conclusion that Maltby was not the suspect at the Dairy Queen transaction in part on the fact Maltby had tattoos on his arms and the suspect in the Dairy Queen transaction did not have tattoos and the sus-

pect in the Dairy Queen transaction had acne and Maltby did not have acne (T. at 151-2). In spite of this, Winston still believed at trial he was right about his identification of Maltby (T. at 121, 588-9).

**6. Reasonable police officers and procedures.** Sage testified it is important to identify people in law enforcement, that a police officer has many different ways available to identify a person, and should use every method available to try to identify someone (T. at 179-80). Kempf testified the police must develop facts in a case and follow obvious leads (T. at 244-5). Police officers should be cautious in the assumptions they make in investigation and should deal with facts rather than assumptions (T. at 248). The difference between an assumption and a fact is decided by an investigation. *Id.* In a situation where more than one person has observed what looks like criminal activity, the police should consult with all available persons and are especially interested in contacting the person with the best and the longest view (T. at 247).

DCI Captain Collins testified a police officer should use common sense to determine that a crime has been committed and that the individual to be arrested committed it (T. at 358). Police officers should use all of their witnesses in cases with multiple witnesses (T. at 576). Police procedures require a follow-up to be done if a question arises about the integrity of an informant or the identity of a suspect (T. at 365).

Kempf testified when police officers deal with known lawbreakers, they must be careful in their dealings (T. at 209). An informant's reliability must be current (T. at 239). Success in the past, does not give an informant a clean bill of health in the future. *Id.* If information is obtained that indicates an informant has acted in an illegal fashion, that heightens the caution level the police should use with that informant (T. at 240).

When Winston was a patrolman, he attempted to investigate a case to its fullest and considered his job to be a fact finder (T. at 95). He understood all pertinent information in an investigation, positive or negative, should be recorded in written reports and passed on to the State's Attorney. *Id.* When Winston was a patrolman, he interviewed all available witnesses to a crime, including those closest to it, and took into account the viewing positions of the witnesses (T. at 95-7). He learned that sometimes a witness has selected (sic) perception (T. at 97). He meant by that what a witness says he saw is not necessarily what happened. *Id.* Sometimes things color a witness' perception and the person does not see an incident accurately. *Id.* When Winston was a patrolman, he had all witnesses identify a suspect separately to get a one-on-one opinion from each witness (T. at 98). Winston agreed Sage had a better view of the person at the Dairy Queen than Winston had (T. at 134). Winston did not believe any informant's reliability would be good forever (T. at 138).

**7. Maltby's expert.** In the opinion of Maltby's expert, Dr. Steve Egger, Winston's factual investigation was a flagrant violation of police procedure (T. at 479). His opinion was based, in part, on the fact there was minimal effort to identify the individual, there was no documentation of the alibi witnesses, and the amount of delay in attempting to verify Maltby's identity (T. at 479-80). (Note: In the course of the denying Maltby's cross-appeal, the appellate court stated: "There is no doubt Dr. Egger was an expert as to general police procedure." 36 F.3d at 564.)

## REASONS FOR GRANTING THE PETITION

### I.

### THE COURT OF APPEALS DECISION REFLECTS A SPLIT OF AUTHORITY ON THE STANDARD OF REVIEW IN THE SEVENTH CIRCUIT. THIS ISSUE HAS ALSO ARISEN IN NINE OTHER CIRCUITS AND CONFLICTING CONCLUSIONS HAVE BEEN REACHED ON IT.

**A. Introduction.** It cannot be questioned that *Malley*, *id.* represents the clearly established law for determining liability for an arrest based on a warrant. As the appellate court correctly observed, this Court adopted the "reasonably well-trained police officer in officer's position" as the standard for determining entitlement to qualified immunity in *Malley*, *id.* This Court held in *Malley*, *id.* if officers of reasonable competence could disagree on the issue of whether probable cause existed to support an application for a warrant, immunity should be recognized. 475 U.S. at 341, 106 S.Ct. at 1096, 89 L.Ed.2d at 278. The Court went on to note the standard gives ample room for mere "mistaken judgements". 475 U.S. at 343, 106 S.Ct. at 1097, 89 L.Ed.2d at 280. The Court concluded, conversely, that qualified immunity does not protect "the plainly incompetent or those who knowingly violate the law." 475 U.S. at 341, 106 S.Ct. at 1096, 89 L.Ed.2d at 278. The real battle raised in this case, is not with these principles, but rather is based upon how they are applied to determine the point on the spectrum of conduct where mistaken judgment ends and plain incompetence or knowing violation of the law begins and how that trial level determination is reviewed on appeal. *Malley*, *id.* did not address these issues directly.

As the Seventh Circuit acknowledged in its decision, its application of a *de novo* standard of review to the trial court's determination of the qualified immunity issue conflicted with other Seventh Circuit cases that applied a clearly erroneous standard of review to the issues. In addition, as set forth, infra, (pg. 12-15) many other Circuits, in-

cluding the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh have struggled among themselves and sometimes even in different cases within the same circuit with the issue of whether qualified immunity is a pure question of law or an issue of fact subject to resolution by a jury and the appropriate standard of review. This Court should decide these important and troublesome issues for the benefit of all citizens of the United States. The record shows the jury and the trial court actually heard evidence on the actions of the "reasonable police officer" from Winston, other officers and Maltby's expert. The fact the jury and the trial judge resolved the issue of qualified immunity against Winston based on the facts and the appellate court determined the issue was a pure question of law provide this Court with an opportunity to review both alternatives and determine if the issue is one of fact or pure law. By deciding the factual or legal nature of the issue, the Court will, in turn, definitively establish the appropriate appellate level standard of review for the benefit of all future cases, as the Court did in cases based on Title VII and 42 U.S. 1981 in the case of *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90, 102 S.Ct. 1781, 1790-1, 72 L.Ed.2d 66, 80-1 (1982).

**B. Appellate court conflict.** In the absence of explicit authority from this Court, the appellate courts have struggled with the issue of whether the trial level determination that a public official's actions represent a "mere mistake in judgment" or "plain incompetence or a knowing violation of the law", in a situation where the law is clearly established in a particularized sense, is an issue of fact or law and the appropriate appellate standard of review of the trial level determination. In the course of this struggle, the appellate courts have reached opposite conclusions on the nature of the issue at the trial level and the standard of review applied to the trial level determination.

One line of cases represented by the instant case from the Seventh Circuit and cases from the First, Second, Fifth, Sixth, Eighth, Tenth and Eleventh circuits has held the application of the "reasonable government official" standard is a question of law solely for consideration of a trial judge and is subject to *de novo* review on appeal. See *Garionis v. Newton*, 827 F.2d 306, 309 (8th Cir. 1987). (Jury trial in an unconstitutional arrest case. The court held the submission of the issue of qualified immunity to the jury was erroneous.); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 561 (1st Cir. 1988) cert. denied 488 U.S. 823, 109 S.Ct. 68, 102 L.Ed.2d 45 (1988). (Jury trial in a case based on death of a prisoner. "Application of the 'legally reasonable' standard is for the court, not the jury."); *Jennings v. Joshua Independent School Dist.*, 877 F.2d 313, 317 n.2. (5th Cir. 1989) cert. denied 496 U.S. 935, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990). (Jury trial in an illegal search case. "[T]he issue of Stevens' immunity under *Malley* is one for the court to decide as a matter of law."); *Melton v. City of Oklahoma City*, 879 F.2d 706, 726 (10th Cir. 1989) vacated 928 F.2d 920 (10th Cir. 1991) and cert. denied ____ U.S. ____ 112 S.Ct. 296, 116 L.Ed.2d 241 (1991). (Jury trial in a police officer discharge case based upon exercise of First Amendment rights. "The application of immunity defenses is a question of law. . . This court reviews those issues *de novo*. Those issues should not have been submitted to the jury.); *Coffman v. Trickey*, 884 F.2d 1057, 1062-3 (8th Cir. 1989) cert. denied 494 U.S. 1056, 110 S.Ct. 1523, 108 L.Ed.2d 763 (1990). (Jury trial in a prison case regarding punishment. "[W]hether legal norms allegedly violated by defendant were clearly established at the time of the challenged action. . . This is a question of law determined by the trial court." Error to submit instruction to the jury.); *Warren v. Dwyer*, 906 F.2d 70, 76 (2nd Cir. 1990) cert. denied ____ U.S. ____, 111 S.Ct. 431, ____ L.Ed.2d ____ (1990). (Jury trial in an unconstitutional arrest case. "The

better rule, we believe, is for the court to decide the issue of qualified immunity as a matter of law. . . If there are unresolved factual issues which prevent an early disposition of defense, the jury should decide these issues on special interrogatories."); *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991). (Jury trial in an excessive use-of-force case. "We reiterate that qualified immunity is a question of law for the court to decide. . . Accordingly, once the defense of qualified immunity has been denied pre-trial due to disputed issues of material facts, the jury should determine the factual issues without any mention of qualified immunity."). *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 998 (6th Cir. 1994). (Jury trial in an unconstitutional search case. "Resolution of qualified immunity is a question of law for the district court (citation omitted). . . Because the issue of qualified immunity is a legal question, no deference is due the district courts conclusion."

Another line of cases from the Second, Fourth, Fifth, Seventh, and Ninth circuits has held the application of the "reasonable government official" standard can be decided by the jury and is subject to a deferential standard of review on appeal. See *Brady v. Gebbie*, 859 F.2d 1543, 1556 (9th Cir. 1988) cert. denied 489 U.S. 1100, 109 S.Ct. 1577, 103 L.Ed.2d 943 (1989). (Jury trial in a discharge case based on failure to provide a name clearing. "Whether at the time of the challenged action the legal norm allegedly violated by an official was clearly established is a question of law. (citation omitted). Whether a reasonable official would know that she is violating the clearly established law as a question for the jury."); *Melear v. Spears*, 862 F.2d 1177, 1185 (5th Cir. 1989). (Jury trial in an unconstitutional search case. "Thus, the law was 'clearly established' under the circumstances of this case, and the jury's decision that Avirett's conduct was objectionably unreasonable must remain untouched."); *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). (Denial of summary judgment in an uncon-

stitutional arrest case. "Ruling on a defense of qualified immunity therefore requires (1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person in the officer's position would have known that doing what he did would violate that right. The first two of these present pure questions of law for the courts. (citation omitted) The third, which involves application of *Harlow's* objective test to the particular conduct at issue, may require factual determinations respecting disputed aspects of that conduct."); *Mahoney v. Kesery*, 976 F.2d 1054, 1059 (7th Cir. 1992). (Jury trial in an unconstitutional arrest case.) *Presley v. City of Benbrook*, 4 F.3d 405, 410 (5th Cir. 1993). (Jury trial in an unconstitutional arrest case. In the face of "disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question.") *Oliveira v. Mayer*, 23 F.3d 642, 649, 650 (2nd Cir. 1994) petition for cert. filed 94-526. (Unconstitutional arrest case. "[W]e think the District Court erred by not submitting the qualified immunity issue to the jury. Though we have decided as a matter of law that the plaintiffs were arrested and this arrest was without probable cause, these holdings do not necessarily mean that it would be unreasonable for a jury to conclude it was objectively reasonable for the police to believe that their detention of the plaintiffs was only a *Terry* stop or that they possessed probable cause to make an arrest.").

This Court should grant certiorari to resolve this raging conflict in the Circuits.

## II.

## THE COURT OF APPEALS MISINTERPRETED SUPREME COURT PRECEDENT IN ADOPTING ITS DE NOVO STANDARD OF REVIEW.

The appellate court relied upon this Court's decisions in the cases of *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092,

89 L.Ed.2d 271 (1986) and *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) in support of its decision to apply a *de novo* standard of review to the jury and district court's denial of qualified immunity (36 F.3d at 555-6 n.7) Maltby respectfully submits the appellate court badly misinterpreted these decisions. Neither of them adopted a *de novo* standard of review for qualified immunity determinations. In addition, language in the decisions actually undermines, rather than supports, a *de novo* standard of review.

In *Malley*, *id.*, the plaintiffs filed an action charging, *inter alia*, that the defendants violated their rights under the Fourth and Fourteenth Amendments of the U.S. Constitution in applying for warrants. The case was tried by a jury and at the close of the plaintiffs' evidence, the police officer was granted a directed verdict. The First Circuit Court of Appeals reversed. The Supreme Court granted certiorari in order to review the First Circuit application of the "objective reasonableness" standard in the arrest warrant context, affirmed the appellate court's reversal and remanded the case for further proceedings. In doing so, this Court stated in its opinion:

> "The question is not presented to us, nor do we decide, whether [defendant's] conduct in this case was in fact objectively reasonable. That issue must be resolved on remand." 475 U.S. at 345 n.8, 106 S.Ct. at 1098 n.8., 89 L.Ed. 2d at 281 n.8.

Presumably, on remand, the plaintiffs would be entitled to a new jury trial to apply the law to the facts. If the Court felt the application of the law to the facts was a pure question of law, the Court surely would have instructed the trial court to decide the issue on its own and prohibited a new jury trial.

In addition, in the course of adopting the standard of whether a reasonably well-trained officer in the officer's position would have known his affidavit failed to establish

probable cause and that he should not have applied for the warrant as the basis for police officer liability in *Malley*, *id.*, the Court explained the standard as the equivalent of "the range of professional competence expected of an officer". 475 U.S. at 346 n.9, 106 S.Ct. at 1098 n.9, 89 L.Ed.2d at 281 n.9. In essence, conduct that is outside of the "range of professional competence" is akin to constitutional law malpractice, albeit with a heightened standard of proof due to the qualified immunity defense. Courts, traditionally, decide malpractice cases based on the facts and they are therefore governed by a clearly erroneous standard of review rather than a *de novo* standard.

In the case of *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), an arrestee brought a civil rights claim against secret service agents. The trial court denied the defendants' summary judgment motion based on the issue of qualified immunity. The Ninth Circuit Court of Appeals affirmed. This Court granted certiorari and reversed based on a summary disposition. The Court held the undisputed facts of the case showed that even if the defendants erred in concluding probable cause to arrest the plaintiff existed, the agents were nonetheless entitled to qualified immunity because their decision was reasonable, even if mistaken. 502 U.S. at 228-9, 112 S.Ct. at 537, 116 L.Ed.2d at 596. This Court made the following criticism of the Ninth Circuit's decision, which had focused primarily on the issue of probable cause to the exclusion of qualified immunity:

> "This statement of law is wrong for two reasons. First, it *routinely* places the issue of immunity in the hands of the jury. Immunity *ordinarily* should be decided by the court long before trial . . . (citation omitted). Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, . . ." (emphasis added by counsel) 502 U.S. at 228, 112 S.Ct. at 537, 116 L.Ed.2d at 596.

It is important to note the Court *did not* state in its analysis the reasonableness of an officer's belief that the situation at hand constituted probable cause could *never* be decided by a jury or that the question must *always* be decided by the court long before trial. In fact, the Court's use of the words "routinely" and "ordinarily" is implicit recognition the issue might not be the proper subject of resolution by the court "long before trial" in all cases and the application of the law to the facts could be the subject of jury determination in appropriate cases.

Therefore, based upon the foregoing, the cases of *Malley v. Briggs*, *id.* and *Hunter v. Bryant*, *id.* do not support the appellate court's decision to apply a *de novo* standard of review in this case. In both cases, this Court stopped well short of adopting such a standard of review, even though it had the opportunity to do so in both cases if it wished. The Court's language in both cases implicitly rejected the *de novo* standard of review adopted by the appellate court.

## III.

## THE LAW, IN THE CONTEXT OF WINSTON'S ACTIONS, WAS CLEARLY ESTABLISHED AND THE COURT OF APPEALS' DECISION IS ERRONEOUS.

In the case of *Elder v. Holloway*, ____ U.S. ____, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344, 351 (1994), an unanimous court held that one aspect of the qualified immunity analysis, whether an asserted federal right was clearly established at a particular time so that a public official who allegedly violated the right did not have qualified immunity from suit, presents a question of law that is resolved *de novo* on appeal. After adopting this principle, the Court remanded the case to the court of appeals with instructions to consider *all* relevant authority on the issue of the state of the law, not simply the cases cited by the parties or discovered by the district court, ____ U.S. ____, 114 S.Ct. at 1021, 127 L.Ed.2d at 348. Therefore, the appellate court in

this case was duty bound to review all relevant precedent on the state of the law. However, it failed woefully in this regard in its analysis of the clearly established law component of qualified immunity when it concluded:

> "[W]e believe that a reasonable officer in Inspector Winston's position, looking to our case-law on probable cause generally, could have concluded Mr. Maltby committed the crime." 36 F.3d at 558.

In reaching its conclusion, it did not cite a single case on probable cause with facts that even remotely resembled the facts of this case that allowed a police officer to escape liability on the basis of qualified immunity. In this case, Winston's request for a warrant was based on a brief glimpse of the suspect in an undercover transaction that was arranged by an informant who was charged with acting in an illegal fashion shortly after the transaction. Winston did not attempt to identify the suspect until approximately 8 weeks after Winston's brief glimpse. Winston did not check his identification of Maltby as the suspect with Winston's fellow officer, who had dealt face- to-face with the suspect for 13 minutes prior to Maltby's arrest and failed to do so for another 60 days after Maltby's arrest. Maltby submits to this Court, as he did to the appellate court, that the lack of a case with facts similar to Winston's actions does not demonstrate the unlawfulness of this conduct was not clearly established. Instead, it can be best explained by the following observation which was made in the case of *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992):

> "[T]he behavior alleged is so egregious that no like case is on the books. . . The easiest cases don't arise."

See also *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994) ("This is such an elementary violation of the First Amendment that the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles.")

Immediately prior to the appellate court's statement, without citation of authorities, that a reasonable police officer could have believed Maltby committed the crime looking to probable cause case-law generally, the appellate court stated:

> "It was incumbent on Plaintiff to prove it was readily apparent to Inspector Winston, given the law of probable cause in existence at the time, that his actions were unlawful." 36 F.3d at 558.

Based on this passage, one might get the impression Maltby's counsel failed to present relevant authority on the issue of the clearly established law. Any such impression is simply not true. Maltby proved to the jury, which as noted previously received an instruction on qualified immunity as established in *Malley*, *id.* and on *six* different occasions to Magistrate Evans and Judge Mills that the law was clearly established in a particularized manner in relation to the facts of this case in the following manner (see App. 47, 60, 61, 63, 66 and 68).

**A. Clearly Established Law—Readily available information.** Maltby's appellee brief cited cases from the First, Fourth, Seventh and Eleventh Circuits which demonstrated it was clearly established in 1987 that the existence of information which was readily available to the police officer and ultimately conclusively negates the issue of probable cause is relevant in determining if the officer's purported probable cause determination is objectively reasonable. The case of *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986) succinctly sets forth the basic principle:

> "A police officer may not close his or her eyes to facts that would clarify the circumstances of an arrest. . . In the present case Hucal had at least four sources of information available to him; he simply chose not to ask anything of anyone.
>
> . . .

> Although the police must be allowed some margin of error, a police officer evaluating a situation for probable cause must utilize the means at hand to minimize the risk of error.
>
> . . .
>
> In the above probable cause analysis we decided that Hucal had acted unreasonably in failing to make further inquiry. Applying *Malley*, we agree with the magistrate that no reasonably well-trained officer could have come to Hucal's conclusion, viewing the situation objectively."

See also *Moore v. The Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1345-6 (7th Cir. 1985) ("This entire episode may have been avoided if the officer who received the original complaint and the arresting officers had used reasonable judgment and conducted a proper investigation, inquiring both as to the plaintiffs' presence in the restaurant and the dispute over the bill. Once explanations were provided, further investigation could have been commenced in an attempt to resolve the dispute in a reasonable manner. . . [I]t is incumbent upon law enforcement officials to make a thorough investigation and exercise reasonable judgment before invoking the awesome power of arrest and detention."); *Sevigny v. Dicksey*, 846 F.2d 953, 958 (4th Cir. 1988) ("Had Dicksey learned what easily could have been learned, and in common prudence should have been, there is reason to doubt that any arrest would have been made. To the extent, therefore, that Dicksey made his arrest on a misapprehension of the facts confronting him, his misapprehension was not a reasonable one."); *Clipper v. Takoma Park, Md.*, 876 F.2d 17, 20 (4th Cir. 1989); *Tillman v. Coley*, 886 F.2d 317, 321 (11th Cir. 1989); and *Rodriguez v. Comas*, 888 F.2d 899, 902 (1st Cir. 1989) ("[H]e should have availed himself of these easily accessible sources. . .") Maltby also cited in his brief the case of *Goodwin v. Metts*, 885 F.2d 157, 164 (4th Cir. 1989) (cert. den. 494 U.S. 1081,

110 S.Ct. 1812, 108 L.Ed.2d 942 (1990) in which the court held: "An officer cannot invoke qualified immunity where he 'did not avail himself of readily available information' . . .". The appellate court did not analyze, criticize, or distinguish this line of clearly applicable cases. It just simply ignored them.

**B. Clearly Established Law—Identification of suspect and viewing.** The law was well established that when an arrest is not made at the scene of a crime, the identity of a suspect must be confirmed promptly. *Tillman v. Coley*, 886 F.2d 317, 321 (11th Cir. 1989). In the case of *U.S. v. Valez*, 796 F.2d 24, 27 (2nd Cir. 1986), cert. den. 479 U.S. 1067, 107 S.Ct. 957, 93 L.Ed.2d 1005 (1987), the court stated as follows on the issue of identification:

> "We agree that where a police officer has or *should have doubts* (emphasis added by counsel) whether a detained suspect is in fact the person sought, the officer must make 'immediate reasonable efforts to confirm the suspect's identity'."

The pure folly of Winston's decision to attempt to identify Maltby eight weeks after the Dairy Queen transaction based upon Winston's brief glimpse of the suspect as the suspect drove away from the scene and his failure to check his subjective belief Maltby was the man with Winston's fellow officer with the best view of the suspect prior to Maltby's arrest is self-evident. When Winston called Maltby in for questioning some eight weeks after the Dairy Queen transaction and approximately a week before Maltby's arrest, Winston could have conducted in essence a show-up, albeit belated, identification of Maltby by the main officer who dealt face-to-face with the suspect in the Dairy Queen transaction, Sage. Winston's failure to do so is strikingly similar to the case of *Tillman v. Coley*, 886 F.2d 317 (11th Cir. 1989), which was based on an October 1985 first buy in an undercover drug investigation. The plaintiff was arrested three months after the transaction. The undercover

officer viewed the plaintiff at the time of her arrest and immediately said she was not the person who had sold him drugs. The court rejected the Sheriff's qualified immunity defense and noted the undercover officer could have identified the plaintiff as the suspect through other means prior to her arrest. 886 F.2d at 321. Not only did Winston not make any effort for the main witness to view Maltby during the nine weeks between the time of the Dairy Queen transaction and Maltby's arrest later, he did not do so until the 60th day following Maltby's arrest. This represents a gap of roughly 17 weeks between the time of the transaction and identification of the suspect by the main eyewitness! Maltby respectfully submits this failure is simply not something that can be "easily rationalized" as done by the appellate court. 36 F.3d at 557.

Winston attempted to excuse his failure to check with Sage sooner, by asserting that his own so-called "good look" of the suspect established probable cause. Unfortunately for Maltby, the appellate court implicitly accepted this assertion. As far as Maltby can discern, the basic premise of this assertion is that Winston stood in a position akin to a victim of a crime based on his brief glimpse of the suspect and therefore information from Winston as a "victim" of the crime established probable cause on a per se basis. However, the actual state of the law is contrary to Winston's position. Information from an asserted victim of a crime does not establish probable cause on a per se basis. *Lewis v. Kendrick*, 944 F.2d 949, 952 (1st Cir. 1991) and *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7, 9-10 (1st Cir. 1984). (Note: Justice Breyer was on the panel for each case.) In addition, in the case of *Coates v. Daugherty*, 973 F.2d 290 (4th Cir. 1992), the view of police officers, who arrested two suspects for shoplifting at the Springfield Mall in Fairfax, Virginia, was at the center of that case. The case was tried by a jury and the jury was instructed on qualified immunity. The plaintiffs won and the defendants' JNOV

motion was denied. The appellate court indicated, in affirming the jury verdicts that its power of review was limited by the Seventh Amendment of the U.S. Constitution which provides:

> "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." 973 F.2d at 293.

The court went on to hold that the determination of whether the defendants' view of the plaintiffs was sufficient for a reasonable police officer to believe he had probable cause to arrest the plaintiffs was a question of fact and properly the subject of resolution by the jury. 973 F.2d at 294.

**C. Clearly Established Law—Cases based on information from informants.** The manner of establishing probable cause in cases based on information from an informant was also well established at the time of Maltby's arrest by the case of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). This Court adopted the "totality of the circumstances" standard in such cases and recognized the need for police investigation and corroboration in assessing information from an informant. 462 U.S. at 241-5, 103 S.Ct. at 2334-5, 76 L.Ed.2d at 550-2. The appellate court held in the instant case that the information from Hankins about the Dairy Queen transaction was corroborated because the transaction took place basically in the fashion Hankins' stated it would, except for the fact a look-alike substance was purchased rather than drugs. However, within a matter of days after the Dairy Queen transaction, information surfaced which indicated Hankins was acting in an illegal fashion by providing substances to others to be sold to Task Force agents and that Hankins intended to split the proceeds of these sales with the party involved. In addition, Hankins failed to maintain contact with Winston after Winston challenged Hankins with this information, which was a violation of Hankins' duties as an

informant. Maltby's arrest was not made until roughly nine weeks *after* Hankins' disappearance. Other than Winston's interview with Maltby a week before his arrest, what "corroboration" did Winston make of Hankins' claim the suspect was "Kerry Maltby"? The obvious answer is none. Furthermore, and perhaps even more damning, Winston never corroborated Hankins' information about the identity of the suspect with Sage until the 60th day after Maltby's arrest. When Sage viewed Maltby, Winston's so-called "corroboration" imploded in 3 seconds when Sage told Winston that Maltby was not the man at the Dairy Queen. At that point, Winston's identification was exposed as worthless. Maltby submitted authority in his brief which demonstrated it was well established that police officers can be liable for an arrest based on a identification ultimately considered to be worthless. See *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988), which was based on an arrest that occurred in 1981. Amazingly, although the court of appeals referred to *Jones, id.* in its opinion, it made no reference whatsoever to this aspect of the case.

The appellate court also blindly accepted Winston's testimony he was not concerned about the variance between the name "Kerry Maltby" Hankins gave for the suspect and the registration of the car to Virgil Riley because "those participating in drug transactions often use cars belonging to other people." 36 F.3d at 557. However, the appellate court made no reference to the undisputed fact Winston was specifically instructed by his supervisor to investigate that variance and Winston failed to do so. In addition, although the appellate court was careful to note Winston checked with DCI when Hankins became an informant and was told Hankins was considered to be a reliable informant by DCI, it made no reference to the fact that DCI received an intelligence report four months prior to the Dairy Queen transaction that indicated Virgil Riley and his family actively sold marijuana or the fact the suspect in the Dairy Queen

transaction made a statement about marijuana that was consistent with the intelligence report.

Maltby respectfully submits these inactions on Winston's part fell far short of the need for police investigation and corroboration mandated by this Court in the case of *Illinois v. Gates*, 462 U.S. 213, 241-5, 103 S.Ct. 2317, 2334-5, 76 L.Ed.2d 527, 550-2 in cases based on information from an informant.

**D. Clearly Established Law—Gravity of offense and probable cause.** The appellate court was quick to note the sale of look-alike substances is illegal (36 F.3d at 551 n.1), but, it made no reference to the clearly established law that the gravity of the offense bears on the issue of probable cause. *Llaguno v. Mingey*, 763 F.2d 1560, 1566 (7th Cir. 1985) (en banc) cert. dismissed 478 U.S. 1044, 107 S.Ct. 16, 92 L.Ed.2d 783 (1986); *BeVier v. Hucal*, 806 F.2d 123, 127 (7th Cir. 1986) and *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534, 537, 116 L.Ed.2d 589, 596 (1991). Although admittedly, the driver of the Ford at the Dairy Queen committed a crime by selling a look-alike substance, this was by no means a heinous crime which required prompt action. Winston did not see the need to seek an arrest warrant until nine weeks after the purchase. Applying the clearly established sliding scale probable cause analysis to the trivial nature of the offense at issue (i.e. deceit of the drug buying public), a police officer should investigate his subjective belief as to the identity of a suspect thoroughly before seeking an arrest warrant.

**E. Clearly Established Law—Presumption of innocence.** Winston, and the appellate court, made light of the fact Maltby denied any knowledge of the Dairy Queen transaction during Winston's pre-arrest interview of Maltby. In doing so, Winston and the appellate court, in essence jettisoned the U.S. Constitution's Fifth Amendment presumption of innocence and case law from this Court. In

the case of *Florida v. Bostick*, 501 U.S. 429, 437, 111 S.Ct. 2382, 2387, 115 L.Ed.2d 389, 400 (1991) this Court stated:

> "We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure (citations omitted).

See also *Rodriguez v. Comas*, 888 F.2d 899, 903 (1st Cir. 1989).

**F. Clearly Established Law—Post-arrest actions and effect on prosecution.** The appellate court held that Winston's post-arrest conduct did not bear on the issue of probable cause because it is determined "at the moment of the arrest is made." 36 F.3d at 557. Maltby freely acknowledges that is the general legal standard. However, counsel submitted at oral argument that the post-arrest evidence was relevant in two respects. First, it showed that other participants in the criminal case, the State's Attorney and Maltby's defense attorney, readily recognized the importance of the identification issue, which should have been apparent to Winston, too. Second, Winston's post-arrest slipshod actions could have been considered by the jury and the trial judge to be the continuation of a pattern of actions that fell below the standard of a reasonable police officer which reflected adversely on the effectiveness of Winston's pre-arrest actions. The facts undisputedly demonstrated that throughout the investigation, pre-arrest and post-arrest, Winston was willing to turn a blind eye to anything that might undermine Hankins' claim the person at the Dairy Queen was "Kerry Maltby" and Winston's subjective belief Maltby was the suspect. Winston's pigheadedness about his beliefs was aptly demonstrated at trial, which took place nearly five years after the Dairy Queen transaction, when he claimed he was right about his identification of Maltby and Sage was wrong (T. at 588-9). (See *Jones v. Chicago*, 856 F.2d 985, 990 (7th Cir. 1988) for an example of a similar trial strategy on the issue of identification that backfired.)

Also, the appellate court distinguished the case of *Whitley v. Seibel*, 613 F.2d 682, 686 (7th Cir. 1980) cert. den. 459 U.S. 942, 103 S.Ct. 254, 74 L.Ed.2d 198, (1982), which stands for the proposition that an officer who intentionally misleads those who have the authority to authorize an arrest may be liable for an arrest, by asserting Maltby had not demonstrated the actions of the prosecutor would have been different if she had been told of the allegations of misconduct involving the informant. 36 F.3d at 557-8 n.9, 10. However, the appellate court failed to address the information Winston withheld on Maltby's identification. Winston kept the fact that Sage hadn't viewed Maltby from the State's Attorney until the day of Maltby's release. The State's Attorney's immediate reaction, upon learning this and that Sage wanted to view Maltby, was to instruct Winston and Sage to go to the jail for Sage to view Maltby and to call her as soon as this was done, even if she were at home (T. at 539-40, 548). In reaching its decision, the appellate court made no reference to the fact that in the case of *Jones v. Chicago*, 856 F.2d 985, 993 (7th Cir. 1988), a case the appellate court cited in its opinion, the court recognized that failing to apprise the prosecutor of the questionable nature of a victim's identification of the suspect can establish liability on the part of the police officer if the omitted information might have negated the State's Attorney's decision to even bring a criminal charge. Actions speak louder than words. The State's Attorney's actions show she would have acted differently if she had been told of this information, initially.

**G. Clearly Established Law—Police officer evidence.** Finally, the *Reasonable Police Officers and Procedures* section of the *Omitted Facts* irrefutably demonstrates reasonably well-trained police officers were well aware of the basic probable cause principles cited by Maltby and that Winston's actions fell far below the standard of a reasonably well-trained police officer. Everyone in the trial court-

room, Winston, the other police officers, the jury, and Judge Mills, knew, based on the evidence, that a reasonable police officer who had a brief view of the suspect should check with the main eyewitness in a case that was initiated on the basis of information from an informant who had disappeared long before the arrest was made. The awareness of these legal principles by real live police officers on the street shows they are clearly established, notwithstanding the appellate panel's contrary view of the law from the 27th floor of the U.S. Courthouse in Chicago. To borrow language the author of the appellate court opinion, Judge Ripple, used in his dissent in the case of *Rakovich v. Wade*, 850 F.2d 1180, 1217 (7th Cir. 1988) (en banc), cert. den. 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988):

> "Not only does the average American law enforcement officer understand this basic proposition, the average American third grader does as well."

Based on the evidence concerning the actions of reasonable police officers, police procedures, and Maltby's expert, it is little wonder that when the jury was instructed it could award punitive damages based on malicious, wanton or oppressive misconduct, it awarded them to Maltby! Maltby submits that Winston's decision to, in the words of Judge Ripple again: "easily rationalize shortcomings of the evidence" (36 F.3d at 557) was correctly determined to be totally unjustified and unwarranted in the eyes of the jury and the trial judge based on the clearly established law.

## IV

## THE QUESTIONS PRESENTED ARE IMPORTANT.

Undercover task force investigations and delayed arrests represent common methods of law enforcement in this day and age. As this case aptly demonstrates, when police officers delay making an arrest in an undercover investigation, the delay creates a risk that the person they ultimately arrest is not the person involved in the undercover trans-

action and a risk of unconstitutional harm for the general citizenry. This Court recognized the importance of providing compensation to law-abiding citizens innocent of any crime, who are victims of unconstitutional conduct in the cases of *Malley v. Briggs*, 475 U.S. 335, 344, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986) and *Elder v. Holloway*, ____ U.S. ____, 114 S.Ct. 1019, 1022-3, 127 L.Ed.2d 344, 350 (1994). If the instant case is allowed to stand, the Fourth Amendment constitutional rights of our nation's citizens and the right of victims of such conduct to be compensated will be diminished. Citizens, nationwide, will be subject to the risk of an arrest based on questionable investigations without the need for the police to check with the main available eyewitnesses on the issue of the person's identity. In response to such a plight by an innocent party, the police will be able to avoid not only liability, but even trial itself, by pointing to this case to show that they are entitled to qualified immunity in such circumstances. As a result, not only will Maltby suffer a violation of his constitutional rights without compensation, but other citizens will needlessly do so as well.

## CONCLUSION

The foregoing demonstrates the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

**KERRY L. MALTBY,**

*Petitioner,*

v.

**MARTY WINSTON, WEST CENTRAL ILLINOIS TASK FORCE, and DEWAYNE BOND, Sheriff of Schuyler County,**

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Nos. 92-1846, 92-1958 and 92-3447

KERRY L. MALTBY,

*Plaintiff-Appellee/Cross-Appellant,*

*v.*

MARTY WINSTON,

*Defendant-Appellant,*

and

DEWAYNE BOND, Sheriff of
Schuyler County, and WEST
CENTRAL ILLINOIS TASK FORCE,

*Defendants/Cross-Appellees.*

---

Appeals from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 88 C 3093—**Richard Mills**, *Judge.*

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ARGUED MARCH 28, 1994—DECIDED SEPTEMBER 14, 1994

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Before CUDAHY and RIPPLE, *Circuit Judges*, and PLUNKETT,* *District Judge.*

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* The Honorable Paul E. Plunkett, of the United States District Court for the Northern District of Illinois, is sitting by designation.

RIPPLE, *Circuit Judge.* Kerry Maltby brought this action against Inspector Marty Winston, Sheriff DeWayne Bond, and the Central Illinois Task Force pursuant to 42 U.S.C. § 1983 for violations of his rights secured by the Fourth Amendment as made applicable to the states through the Fourteenth Amendment. All of the defendants moved for judgment as a matter of law. The district court entered judgment in favor of Sheriff Bond, but denied such relief to the Task Force and to Inspector Winston. The question of liability went to the jury; it found that Inspector Winston had violated Mr. Maltby's rights and was not entitled to qualified immunity. The jury, however, returned a verdict in favor of the Task Force. Officer Winston now appeals. Mr. Maltby cross-appeals the district court's judgment as a matter of law in favor of Sheriff Bond and the jury's verdict in favor of the Task Force. For the reasons that follow, we affirm in part and reverse in part.

## I

## BACKGROUND

### A. *Facts*

The West Central Illinois Task Force ("Task Force") is a multijurisdictional law enforcement agency comprised of various rural police and sheriff's departments. The Task Force is organized pursuant to the Illinois Constitution and to the Intergovernmental Cooperation Act, 5 ILCS 220/1, which allow local governmental entities to pool resources. The purpose of the Task Force is to combine resources to combat more efficiently increased drug trafficking through both covert and overt operations. Any local department that wishes to join the Task Force is required to donate the services of one officer and a working car. The Task Force is directed by a Review Committee composed of the head officers from the participating agencies. It receives assistance from the Illinois Department of Criminal Investigation ("DCI"), which provides the Task Force with a facility to house the unit,

training programs, equipment, and inspector status for its officers. Sheriff DeWayne Bond of Schuyler County desired to participate in the Task Force. He assigned one of his deputies, Marty Winston, to the Task Force.

On June 4, 1987, the Task Force conducted a covert drug investigation. Inspector Winston received a tip from a confidential source that a man named Kerry Maltby would be at the Dairy Queen in a brown Ford and would be prepared to sell narcotics. The source of this information was Anthony Hankins, who had become an informant of the Task Force two months earlier. When Inspector Winston had inquired, the DCI had informed him that Hankins was considered a reliable informant. Hankins had provided information to the Task Force on purchases of look-alike substances[1] and, as a result of these dealings, Inspector Winston considered Hankins reliable. With respect to this purchase, Hankins called Inspector Winston and told him that he had set up a drug purchase for six o'clock that evening. Hankins further informed Inspector Winston that the name of the seller was Kerry Maltby and that Hankins knew Mr. Maltby personally. In response to this information, the Task Force organized a surveillance team to monitor the undercover drug purchase.

At 5:45 p.m., Sergeant Gerald Kempf and Inspectors Winston and Bushon observed Inspector Sage pick up Hankins in Inspector Sage's undercover vehicle. Inspector Sage then advised the agents that he and Hankins were to meet Mr. Maltby at the Dairy Queen parking lot, and that Mr. Maltby was going to be driving a brown Ford. Inspector Winston, from a distance of approximately 200 feet, observed the undercover vehicle pull into the parking lot next to a brown Ford with a man in the driver's seat. Inspector Sage left his car and went over to the

[1] The transactions that Hankins previously had set up did not involve actual narcotics, but look-alike substances. In Illinois, the sale of such substances, when the sellers represent them to be narcotics, is illegal.

brown Ford. Hankins introduced the person in the Ford as Kerry Maltby. Inspector Sage then purchased what purported to be LSD from Mr. Maltby and also inquired about purchasing marijuana. During the entire transaction, which lasted approximately thirteen minutes, Mr. Maltby did not leave his car. After the transaction, the brown Ford left the parking lot and drove past Inspector Winston at between 15 and 25 miles per hour and at a distance of approximately thirty feet. The agents did not arrest Mr. Maltby after the transaction because they hoped to conduct more drug transactions with him. Inspector Winston later discovered that the brown Ford driven by the seller was registered to a Virgil Riley of Beardstown.

Sometime after this transaction, a suspect involved in prior marijuana purchases set up by Hankins contacted Inspector Sage to arrange a purchase. This suspect, Chestnut, told Inspector Sage that he intended to split the money from the proposed sale with Hankins. Receiving the proceeds from any drug transaction would have violated Hankins' informant agreement with the Task Force. Inspector Winston confronted Hankins with Chestnut's intention to split the money and, consequently, Hankins did not participate in any more transactions with the Task Force; indeed, he left town for a period of time.

Because Hankins was no longer available to set up undercover drug purchases from Mr. Maltby, the possibility of further purchases from the source evaporated. Inspector Winston therefore brought Mr. Maltby in for questioning regarding the Dairy Queen incident with the purpose of trying to persuade Mr. Maltby to become an informant. At the meeting, Mr. Maltby denied knowledge of the Dairy Queen transaction and declined to be an informant.

About a week later, after consulting with the supervising officer for the Dairy Queen transaction, Sgt. Kempf, Inspector Winston provided information on the Dairy Queen incident to the prosecutor, Alesia McMillen, in order to obtain a warrant for Mr. Maltby's arrest. The prosecutor in turn presented the information to a state circuit court

judge. The judge issued a warrant for Mr. Maltby's arrest, and he was arrested the following day.

On August 12, Mr. Maltby appeared for a preliminary hearing. At the hearing, the prosecutor, as was her practice, called only one officer to testify to establish probable cause. Inspector Winston testified that he got a good look at the man who sold Inspector Sage the purported LSD and that the man was Mr. Maltby. Mr. Maltby's counsel cross-examined Inspector Winston on his view of the suspect but, for strategy reasons, called no witnesses on Mr. Maltby's behalf. There were, however, three alibi witnesses at the hearing prepared to testify. After the hearing, defense counsel advised the prosecutor of the alibi witnesses. Prosecutor McMillen then requested Inspector Winston to check out the witnesses' statements in preparation for trial. The parties met again on October 1 for a pretrial conference. At this time, Mr. Maltby declined a plea bargain and the case proceeded to trial.

Sheriff Bond was the person who transported Mr. Maltby from the jail to the courthouse for these hearings. During one of Mr. Maltby's trips to the courthouse, it is not clear which one, Mr. Maltby told Sheriff Bond that the authorities had the wrong person. As a precaution, Sheriff Bond called Task Force headquarters to make sure that Mr. Maltby had been identified by the undercover officer.

On October 6, in preparation for trial, Inspector Winston asked that Inspector Sage view a mug shot of Mr. Maltby. The photograph, however, was of poor quality, and Inspector Sage requested to view the suspect in person. Inspector Sage and Inspector Winston then went to the Fulton County Jail. After viewing Mr. Maltby for three seconds, Inspector Sage told Inspector Winston that Mr. Maltby was not the man from whom he had purchased the look-alike substance in the Dairy Queen parking lot. Inspector Winston notified the prosecutor of Inspector Sage's lack of identification. The prosecutor telephoned the judge and he authorized her to contact the jail for Mr. Maltby's immediate release.

B. *District Court Proceedings*

Mr. Maltby brought this suit against Inspector Winston, Sheriff Bond, and the Task Force for violating his civil rights. At the close of plaintiff's case, all of the defendants moved for judgment as a matter of law.[2] The court granted Sheriff Bond's motion:

> [T]here is no way that a verdict against Sheriff Bond, qua sheriff, could stand. Absolutely none. There is not any evidence in this record that ties him directly into any of the actions upon which Mr. Maltby could have a cause of action.

R.610. The district court denied the motion with respect to the Task Force and Inspector Winston. Counsel for Inspector Winston then reminded the court that Inspector Winston had claimed the defense of qualified immunity. The district court assured counsel that the question was still "viable."[3]

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[2] Officer Winston and Sheriff Bond previously had moved for summary judgment on the ground of qualified immunity. A magistrate judge recommended denying the motions. He reasoned:

> Making a positive identification of a suspect falls within the scope of common sense in police work. Reasonably well-trained police officers know or should know the need to make sure the man they arrest is the one involved in the offense under investigation. Therefore, the Defendants' claim that their conduct did not violate clearly established rights of which a reasonable police officer would have known is rejected.

R.135 at 10. The magistrate judge also rejected Sheriff Bond's claims of qualified immunity. He found that there were issues of fact concerning whether Sheriff Bond was a policymaker for the Task Force and therefore responsible for the misidentification on a failure to train theory. *Id.* at 13-14. The district court accepted the magistrate judge's recommendation and denied the motions for summary judgment. R.159.

[3] After the district court granted Sheriff Bond's motion for judgment as a matter of law, the following discussion occurred between counsel for Inspector Winston and the court:

(Footnote continued on following page)

After the defendants presented their evidence, the court instructed the jury on qualified immunity and probable cause.[4] The jury returned a verdict for Mr. Maltby against Inspector Winston. However, it exonerated the Task Force. Inspector Winston then moved for judgment as a matter of law or in the alternative for a new trial. The court denied these motions. After hearing evidence on damages, the jury awarded Mr. Maltby $50,000 in compensatory damages and $2,300 in punitive damages. Later the court awarded Mr. Maltby attorney's fees.

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[3] *continued*

| | |
|---|---|
| Ms. McNaught: | Your Honor, I also would make a motion for the—for judgment as a matter of law. |
| Court: | All right. And that's on behalf of—. |
| Ms. McNaught: | Marty Winston and the West Central Illinois Task Force. |
| Court: | Very well. And I, however, will deny those motions at this time. It seems to me that we have adequate evidence in here that it becomes a question of fact for this jury. And I think that I would be overstepping my prerogatives and would be violating the standard that I am held accountable to here. So, consequently, those motions are denied. And if you would like to just file a short written motion as to each, it might be wise, to flesh out the record. |
| Ms. McNaught: | I do have a question about Marty Winston. We have asserted qualified immunity on his behalf, and I believe that is a question only for the Court. |
| Court: | That's still a viable one. |
| Ms. McNaught: | Okay. |

Tr. 614-15.

[4] The court made rulings on proffered instructions in an instructions conference held without a court reporter present. No part of the formal record indicates which instructions were given over objections, nor if there were proffered instructions that were rejected.

Inspector Winston now appeals. He asserts numerous errors in the district court's decision—primarily that it erred in denying him qualified immunity. He also contends that the district court abused its discretion in admitting certain expert testimony, and that the district court erroneously instructed the jury. Mr. Maltby cross-appeals the court's judgment for Sheriff Bond and the jury verdict in favor of the Task Force. He maintains that the court erred when it denied him certain discovery requests and when it instructed the jury.

## II

## ANALYSIS

Although the parties present many issues for our consideration, we address only those the resolution of which is necessary to a decision in the appeal before us.

### A. *Inspector Winston's Qualified Immunity*

We begin our evaluation of the qualified immunity issue by setting forth Mr. Maltby's allegations against Inspector Winston. In his complaint, Mr. Maltby alleges the following actions on the part of Inspector Winston:

> 18. The misidentification of the Plaintiff by the Defendant Marty Winston and Defendant Marty Winston's subsequent failure to investigate and/or [c]onsult with others regarding Plaintiff's claim of misidentification exhibits malice, gross negligence, wilful and wanton misconduct and/or reckless disregard for the constitutional rights of the Plaintiff.
>
> 19. Defendant, MARTY WINSTON, knew or should have known that his actions and omissions would cause a depravation [sic] of Plaintiff's constitutional rights or were substantially certain to cause a depravation [sic] of Plaintiff's constitutional rights.

R.33. Although Mr. Maltby includes in his complaint allegations of failure to investigate, the jury never was in-

structed whether these actions could result in liability. Mr. Maltby does not challenge the adequacy of these jury instructions on appeal. The jury was instructed only that Inspector Winston's arrest without probable cause could result in liability.[5] Because absence of probable cause for the arrest was the only ground of recovery presented to the jury, Inspector Winston must show entitlement to qualified immunity only on this ground in order to prevail.

Generally speaking, "government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "[T]he issue of qualified immunity is a legal question for the trial court,

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[5] The court instructed the jury accordingly:

> One of plaintiff's claims is that he was deprived of his liberty "without due process of law." To be deprived of one's liberty without "due process of law" means to be deprived of such right without authority of the law. Before you can determine, then, whether or not the Plaintiff was deprived by the Defendant(s) of his liberty "without due process of law" you must first determine from a preponderance of the evidence in the case whether the Defendant(s) committed the acts alleged, and, if so, whether the Defendant(s) acted under circumstances within or without the bounds of their lawful authority under state law. If the Defendant(s) acted within the limits of their lawful authority under state law, then the Defendant(s) could not have deprived the Plaintiff of any right "without due process of law."
>
> Under the law of the State of Illinois, police officers may not apply for an arrest warrant unless they have probable cause to believe that a crime has been committed and the person in question has committed that crime. Probable cause exists if the facts and circumstances known to the officer and of which he had reasonable, trustworthy information are sufficient to warrant a prudent person in believing that the person has committed a crime.

R.224.

not the jury.[6] Although the qualified immunity determination is a legal question it is not answered in the abstract but in reference to the particular facts of the case." *Rakovich v. Wade*, 850 F.2d 1180, 1201-02 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988). In order for the plaintiff to prevail, it is not enough to recite a well-known constitutional principle and state that the actions taken by the officer violated that principle. Instead,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. This is not to say that an official action is protected by qualified immunity unless the previous action has been held unlawful, but it is to say that in the light of the preexisting law the unlawfulness must be apparent.

*Anderson v. Creighton*, 483 U.S. 635, 640 (1987). As this court explained in a later review of Supreme Court authorities:

> The Supreme Court found too general the appellate court's finding that it had been clearly established that the fourth amendment prohibited warrantless searches of a home absent probable cause and exigent circumstances. Instead the proper inquiry, the Court held, was whether "it was not clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances."
>
> . . . .
>
> These examples indicate "that the test for immunity should be whether the law was clear in relation

---

[6] Qualified immunity, we have stated, is not merely a defense to liability but an immunity from suit. *Gorman v. Robinson*, 977 F.2d 350, 354 (7th Cir. 1992). Accordingly, " 'qualified immunity questions should be resolved at the earliest possible stage in litigation.' " *Cygnar v. City of Chicago*, 865 F.2d 827, 843 n.16 (7th Cir. 1989) (quoting *Anderson v. Creighton*, 483 U.S. 635, 646 (1987)).

> to the specific facts confronting the public official when he acted." "Before a right is 'clearly established' it must be 'sufficiently particularized to put potential defendants on notice that their conduct is unlawful.' "

*Rakovich v. Wade*, 850 F.2d at 1208-09.

The Supreme Court has, on two occasions, applied this standard to false arrest situations. In *Malley v. Briggs*, 475 U.S. 335, 337 (1986), the Supreme Court determined the level of immunity afforded to police officers when it is "alleged that the officer caused the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and a supporting affidavit which failed to establish probable cause." The Court rejected a claim by the defendant police officers that "policy considerations require absolute immunity for the officer applying for a warrant." *Id.* at 341. The Supreme Court explained that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . [If] officers of reasonable competence could disagree on this issue, immunity should be recognized." *Id.* The Court then framed the test accordingly: "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345. Similarly, we have recognized that

> *Malley* . . . created room for an immunity defense even in cases where there was no probable cause for the arrest by holding that "if officers of reasonable competence could disagree" on whether there was probable cause, the defendant would be immune from damages liability. In other words, only if no reasonable officer could have mistakenly believed that he had probable cause to arrest is immunity forfeited.

*Rakovich*, 856 F.2d at 994 (citations omitted). This analysis recently has been reinforced by the Supreme Court in *Hunter v. Bryant*, 112 S. Ct. 534 (1991). In *Bryant*, the

court reiterated that "[e]ven law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to [qualified] immunity." *Id.* at 536.

We therefore turn to the case before us: Was Inspector Winston presented with a situation in which no reasonable officer could have believed that he had probable cause to arrest Mr. Maltby? Although the standard of review is certainly not outcome-determinative, we believe that the issue of whether a constitutional right, in this case the right to be free from arrest without probable cause, is clearly established in a sufficiently particularized manner is a question of law we review de novo. *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 401 (7th Cir. 1993).[7] In analyzing this question, we look to the facts

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[7] Some panels of this court have stated, without circulation to the whole court under Circuit Rule 40(f), that the standard of review for denials of qualified immunity when probable cause is at issue is clearly erroneous and not de novo. In *Mahoney v. Kesery*, 976 F.2d 1054 (7th Cir. 1992), a panel of this court reviewed a finding of probable cause and a denial of qualified immunity on a clearly erroneous standard:

> We shift focus now from the trial court to the appellate court: Whoever makes the finding of probable cause (judge or jury), we do not review it *de novo*, because for purposes of appeal such a finding is a finding of fact. (We do of course review pure determinations of law, and they are frequent in immunity cases.) The standard for appellate review of findings of probable cause was unsettled when this case was briefed and argued, though there was abundant authority that the standard was clear error—at least in a civil rights case, such as this. E.g., *Jones v. City of Chicago*, *supra*, 856 F.2d at 995; *Hughes v. Meyer*, 880 F.2d 967, 969 (7th Cir. 1989); *United States v. McKinney*, 919 F.2d 405, 419 (7th Cir. 1990) (concurring opinion). *Sinkunas v. Tardi*, *supra*, 930 F.2d at 1291, does, it is true, say that the standard of review is *de novo*, but the court was speaking in the context of review of summary judgment—where the standard really is *de novo*. We are asked in this case to review a factual determination of probable cause, not a legal determination that there is no genuine issue of material fact, and it is now settled that the standard

(Footnote continued on following page)

[7] *continued*

> of review of a factual determination of probable cause is, in this circuit anyway, clear error, and this whether the determination is made by a magistrate, by a district judge or the trial judge, or by a jury. *United States v. Spears*, 965 F.2d 262, 269 (7th Cir. 1992).

*Kesery*, 976 F.2d at 1059. The reason for the deferential standard, the panel stated, is that when a § 1983 action centers on the existence of probable cause, the question of immunity (whether a reasonable officer acting in the officer's position would have known that he was violating a constitutional right) merges with the merits (whether a reasonable officer in the officer's position would have believed the person had committed a crime). *Maxwell v. City of Indianapolis*, 998 F.2d 431, 435-36 (7th Cir. 1993), also suggested that the issues of qualified immunity and the merits merge when probable cause is involved. However, we believe the premise (that the merits and the question of probable cause merge), on which the conclusion (that a clearly erroneous standard of review applies) is based, does not adequately take into account the Supreme Court authority which is binding upon this court. In both *Malley* and *Bryant*, the Supreme Court dealt with qualified immunity based on probable cause. In both cases, the Court suggested a bifurcated analysis—an inquiry into qualified immunity separate from that of probable cause. *See* discussion *supra*. We believe that, if the Court had believed that the questions of qualified immunity and probable cause merged, these cases presented appropriate opportunities to so hold. Furthermore, this court has recognized that other Supreme Court authority suggests the two-prong inquiry. *See Hughes v. Meyer*, 880 F.2d 967, 970 (7th Cir. 1989) ("But even in the absence of probable cause for an arrest, qualified immunity provides officers with an additional layer of protection against civil liability.") (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)), *cert. denied*, 495 U.S. 931 (1990). Thus, we do not believe that *Kesery* can control our inquiry here.

The *Kesery* panel noted three other cases that have applied a clearly erroneous standard: *Hughes v. Meyer*, 880 F.2d 967 (7th Cir. 1989); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); and *Klein v. Ryan*, 847 F.2d 368 (7th Cir. 1988). After a thorough review of these cases, we do not believe that they support the use of a clearly erroneous standard. In *Hughes*, this court stated:

> We apply the "clearly erroneous" standard of review to the district court's determination that " 'a reasonable police officer in like circumstances [c]ould have acted as the defendants did.' "

(Footnote continued on following page)

that Inspector Winston knew at the time that he applied for the warrant. We evaluate whether "the facts and circumstances within the officer['s] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent person in believing that an offense has been committed." *Hughes v. Meyer*, 880 F.2d 967, 969 (7th Cir. 1989), *cert. denied*, 495 U.S. 931 (1990). "Probable cause requires more than bare suspicion, but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false." *Id.*

Looking at what was known to Inspector Winston at the time he applied for the warrant, the following facts support a finding that Mr. Maltby was the person who sold the look-alike substance to Inspector Sage: Hankins' identification, prior to the Dairy Queen incident, that the man selling the drugs would be Kerry Maltby; Hankins' information that the seller would be arriving in a brown Ford; Inspector Winston's observation of a male parked

---

[7] *continued*

880 F.2d at 969 (quoting *Jones*, 856 F.2d at 995 (quoting *Klein v. Ryan*, 847 F.2d 368, 374 (7th Cir. 1988))). Yet, the court in *Hughes* also noted that qualified immunity "provides officers with an additional layer of protection against civil liability." *Id.* at 970. The *Jones* court stated the standard accordingly:

> The issue rather is whether the district judge committed a clear error in finding that no "reasonable officer in like circumstances would have acted as the defendants did[.]" *Klein v. Ryan*, 847 F.2d 368, 374 (7th Cir. 1988).

*Jones*, 856 F.2d at 995. Yet, it also distinguishes between "whether the defendants had probable cause" and whether "reasonable officers in their position *could* have thought they had probable cause." *Id.* We look, therefore, to *Klein*, which forms the basis for all of the other opinions. That decision, however, never addresses standard of review. *Klein*, it is true, states that "[w]e need only consider whether a reasonable officer in like circumstances would have acted as defendants did." *Klein*, 847 F.2d at 374. This court in *Klein* made that determination on its own—there is no suggestion in that opinion that deference was given to the district court with respect to this inquiry. Consequently, we review the district court's qualified immunity determination de novo.

in a brown Ford in the Dairy Queen parking lot; Hankins' introduction of the man in the Ford as "Kerry"; Inspector Winston's observation of the undercover purchase; Inspector Winston's observation of the man in the Ford driving past his surveillance position; Inspector Sage's report of purchasing 1.1 grams of LSD from Kerry Maltby; and Inspector Winston's viewing of Mr. Maltby face-to-face after the incident. We believe that these factors would lead a reasonable officer to believe that a crime had been committed and that Mr. Maltby was the perpetrator.

There were also factors, however, that came to light after the transaction, that weighed against a finding that Mr. Maltby was the person involved. First, Hankins, the confidential informant, left town after being confronted with information that he was engaging in illegal activity. Second, the brown Ford was not registered to Mr. Maltby, but to a Virgil Riley. Finally, when Mr. Maltby was questioned about the incident, he denied all knowledge of the transaction. Nevertheless, we believe that, even in the face of these circumstances, a reasonable officer could have believed he had probable cause. Hankins' reliability had been called into question generally; however, his information regarding the Dairy Queen transaction had been corroborated, to a great degree, by the officers who witnessed the transaction. Furthermore, the fact that the brown Ford used during the transaction was not registered to Mr. Maltby also did not negate probable cause; as Inspector Winston explained, those participating in drug transactions often use cars belonging to other people. Finally, Mr. Maltby's denial of involvement certainly could not make Inspector Winston's actions unreasonable; those accused of crimes more often than not deny, at least initially, their involvement.

As we have said previously, "[p]olice officers are entitled to qualified immunity if a reasonable officer, in applying for a warrant, could have believed that there was probable cause to support the application." *Schertz v. Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989). An

officer who had witnessed a purported drug transaction and who had made an identification of the seller could easily rationalize the shortcomings of the evidence; such a lapse at most reveals a mistake in judgment. The Supreme Court has stated: "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter*, 112 S. Ct. at 537 (quoting *Malley*, 475 U.S. at 341).

Mr. Maltby points to evidence that came to Inspector Winston's attention after the arrest. For example, Mr. Maltby notes that there was testimony at trial by his defense counsel that Inspector Winston agreed to verify Mr. Maltby's identification after the preliminary hearing. Tr. 396. However, the probable cause determination is made " 'at the moment the arrest is made.' " *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991) (citations omitted); *see also Gramenos v. Jewel*, 797 F.2d 432, 439 (7th Cir. 1986) (stating that "it's what the police know, not whether they know the truth, that matters"), *cert. denied*, 481 U.S. 1028 (1987). Any evidence, therefore, that came to light after the arrest is not relevant to the probable cause inquiry. Furthermore, we note that, as stated above, the jury was instructed that a violation of constitutional rights may be found only if the officer lacked probable cause at the time of the arrest. On the record before us, no instruction was proffered with regard to a continuing obligation.

Mr. Maltby also points to the fact that Inspector Winston did not inform the prosecutor of Hankins' disappearance prior to the preliminary hearing. Mr. Maltby submits that, because of this omission, Inspector Winston is not entitled to qualified immunity because he intentionally misled the prosecutor and the judge. *See Whitley v. Seibel*, 613 F.2d 682, 686 (7th Cir. 1980) (stating that an officer who "intentionally misleads those who do have the ultimate authority to authorize the arrest . . . may be found to have deprived the arrestee of his liberty without due

process of law"), *cert. denied*, 459 U.S. 942 (1982).[8] However, whatever Hankins' shortcomings, his information with regard to this transaction largely had been corroborated.[9] Consequently, the fact that Hankins' general reliability had been called into question by his flight would have had little, if any, bearing on the outcome of the preliminary hearing or on the prosecutor's decision to pursue the case.[10]

It was incumbent upon Mr. Maltby to prove that it was readily apparent to Inspector Winston, given the law of probable cause in existence at the time, that his actions were unlawful.[11] Thus, we believe that a reasonable of-

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[8] *Cf. Malley*, 475 U.S. at 341 (noting that qualified immunity does not extend to those who "knowingly violate the law").

[9] Indeed, the prosecutor testified that the information from the confidential informant played a very minor role in the decision to prosecute Mr. Maltby. The prosecutor testified:

> Mr. Lanterman: In those police reports, was there any indication that the confidential source had been accused of providing substances to the Task Force—excuse me—to people that, in turn, sell to the Task Force?
>
> Prosecutor: I don't recall that there was any particular information about the confidential source in those reports. I believe that was simply how the investigation was begun. But, really, the confidential source had little to do with the actual event, which the report later went on to describe.

Tr. at 528.

[10] Indeed, there is no indication from the record that the prosecutor's decision would have been different had she known this information regarding the confidential source.

[11] *See Donovan v. City of Milwaukee*, 17 F.3d 944, 951 (7th Cir. 1994) ("The plaintiff bears the burden of establishing the existence of a clearly established constitutional right."); *Apostol v. Landau*, 957 F.2d 339, 341 (7th Cir. 1992) ("The plaintiff bears the burden of convincing the court of the existence of the clearly established constitutional right at issue.").

ficer in Inspector Winston's position, looking to our case-law on probable cause generally, could have concluded that Mr. Maltby committed the crime. Consequently, Inspector Winston is entitled to qualified immunity.[12] We therefore reverse the judgment entered against him.

B. *Mr. Maltby's Cross-Appeals*

1.

Mr. Maltby first contests the district court's judgment in favor of Sheriff Bond. We review a judgment as a matter of law de novo and "consider the evidence in the light most favorable to the nonmoving party. We shall reverse the judgment only if enough evidence exists that might sustain a verdict for the nonmoving party." *Continental Bank N.A. v. Modansky*, 997 F.2d 309, 312 (7th Cir. 1993). "This evidence must provide a sufficient basis from which the jury could have reasonably reached a verdict without speculation or drawing unreasonable inferences which conflict with the undisputed facts." *Selle v. Gibb*, 741 F.2d 896, 900 (7th Cir. 1984).

Although his position is difficult to discern, Mr. Maltby seems to suggest that Sheriff Bond had knowledge of the alleged constitutional violation and also had a duty to intervene to prevent Mr. Maltby's rights from being violated. However, there is no evidence that Sheriff Bond had any knowledge of the alleged constitutional violation. All of the witnesses with personal knowledge of the Dairy Queen transaction testified that they did not discuss with

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[12] Because we determine that Inspector Winston is entitled to qualified immunity, we have no occasion to reach his other claims of error. Specifically, we do not address whether probable cause actually existed, whether the court abused its discretion in admitting expert testimony over Inspector Winston's objection, whether the court erred in instructing the jury on qualified immunity, whether the jury's verdict is against the weight of the evidence, whether the damage award is excessive, or whether the court abused its discretion in awarding attorney's fees.

Sheriff Bond the initial information from Hankins, the details of the buy itself, or the subsequent proceedings. Inspector Winston testified that he apprised Sheriff Bond of the Dairy Queen transaction, but "[j]ust the basics of what we did. We bought what we believed to be a controlled substance from Kerry Maltby." Tr. 115. Inspector Winston did not inform Sheriff Bond of the particulars of the transaction, specifically the identity of the confidential informant. *Id.* Sergeant Kempf testified that he told Sheriff Bond that Mr. Maltby was going to be arrested. *Id.* at 283. However, he also testified that Sheriff Bond had no connection with the transaction that served as the basis for the criminal complaint because this was strictly a Task Force operation. *Id.* at 283-84. Sergeant Kempf also testified that the Task Force Review Committee, of which Sheriff Bond was a member, would receive a general overview of Task Force activities at its monthly meeting. However, the update was "[s]trictly an overview" of the operations and did not venture into the details of any of the transactions. *Id.* at 349. Mr. Maltby's attorney in the criminal proceedings, testified that he did not discuss Mr. Maltby's case with Sheriff Bond because "he was simply the custodian of Mr. Maltby, as a Sheriff. This was a drug and Task Force thing. And I don't think the Sheriff was actually involved." *Id.* at 391. Sheriff Bond testified that his only contact with Mr. Maltby was transporting him to and from his court appearances. During one of these trips, Mr. Maltby had said that "we had the wrong guy, and that he didn't know why he had been charged. Something to this order." *Id.* at 497. Sheriff Bond, in response, phoned the Task Force office to make sure that there had been an identification of Mr. Maltby. *Id.* at 498. Finally, the prosecutor stated that she never spoke with Sheriff Bond about the case. *Id.* at 545-46.

Mr. Maltby claims that, on the basis of Sheriff Bond's actions (inquiring whether the undercover officer had identified Mr. Maltby), a reasonable jury could infer that he knew that a positive identification had not been made, that he knew that Hankins was the informant, and consequently, that he knew that the entire case against Mr.

Maltby "was based on a snitch who had disappeared." Appellee/Cross Appellant's Br. at 60. "These inferences," argues Mr. Maltby, "could have been taken into account by the jury in assessing Bond's knowledge and supported a judgment against him." *Id.* Mr. Maltby points to *Juriss v. McGowan*, 957 F.2d 345 (7th Cir. 1992), in support of the proposition that the jury could draw such inferences. Mr. Maltby's reliance on *Juriss* is misplaced. In *Juriss*, several witnesses were willing to testify that the defendant had misrepresented crucial facts to the grand jury. The court determined that there was sufficient evidence to raise a jury issue as to whether the defendant had participated with another officer in violating plaintiff's civil rights. By contrast, here there is no evidence that Sheriff Bond knew anything about the Dairy Queen transaction other than that it took place and that the seller was Kerry Maltby. There are no discrepancies in testimony from which the jury could infer that Sheriff Bond knew more than the most basic of facts surrounding this transaction. Mr. Maltby produced no evidence that Sheriff Bond had any knowledge that should have apprised him of the alleged constitutional deprivations. Any verdict against Sheriff Bond, therefore, would have been based on pure speculation. The district court did not err in entering judgment as a matter of law for Sheriff Bond.

In sum, Mr. Maltby's claim against Sheriff Bond fails because there is no evidence that Sheriff Bond was personally involved in the alleged violation. We have stated that

> "[t]o recover from damages under 42 U.S.C. § 1983, a plaintiff must establish defendant's personal responsibility for the claimed deprivation of the constitutional right. However, a defendant's direct participation in the deprivation is not required. An official satisfies the personal responsibility requirement of section 1983 if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent."

*Rascon v. Hardiman*, 803 F.2d 269, 273 (7th Cir. 1986) (quoting *Smith v. Rowe*, 761 F.2d 360 (7th Cir. 1985) (citations omitted)). There are no facts presented, however, that evidence any kind of personal involvement by Sheriff Bond in the alleged constitutional violation. Sheriff Bond did not participate in the transaction, in the arrest, the preliminary hearing, or any part of the prosection of Mr. Maltby. Sheriff Bond was Mr. Maltby's custodian and nothing else.[13] Consequently, there is not sufficient evidence for a jury to hold Sheriff Bond liable for any of Mr. Maltby's alleged constitutional violations.

2.

Mr. Maltby also cross-appeals the jury verdict in favor of the Task Force. Mr. Maltby suggests three grounds for reversal. First, Mr. Maltby claims that he was prejudiced when the district court failed to give his proffered instructions and gave other instructions over his objection. Second, he argues that the trial court abused its discretion in not allowing him to pursue certain matters in discovery. Finally, he maintains that the district court abused its discretion by refusing to allow his expert to testify regarding certain policies of the Task Force. We turn first to his jury instruction argument.[14]

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[13] Sheriff Bond's continued detention of Mr. Maltby after his claim of innocence does not constitute a constitutional violation. *Cf. Baker v. McCollan*, 443 U.S. 137, 145-46 (1979) (stating that official charged with custody of accused has no independent duty to investigate even repeated claims of innocence by the accused).

[14] The Task Force, responding to Mr. Maltby's cross-appeal, for the first time claims that it is not a person for the purposes of § 1983 liability and, consequently, the district court did not have jurisdiction to hear this case. We disagree with the Task Force's contention. According to 745 ILCS 10/1-202, which defines "Local public entity" for the purposes of the Local Governmental and Governmental Employees Tort Immunity Act, "Local public entity" includes "any intergovernmental agency or similar entity formed

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a. propriety of jury instructions

Our review of jury instructions on appeal is limited. "We review jury instructions only to determine if 'the instructions as a whole were sufficient to inform the jury correctly of the applicable law.' " *Patel v. Gayes*, 984 F.2d 214, 218-19 (7th Cir. 1993) (quoting *United States v. Villarreal*, 977 F.2d 1077, 1079 (7th Cir. 1992), *cert. denied*, 113 S. Ct. (1993)). "Reversal is warranted only if the instruction misguides the jury so much that a litigant is prejudiced." *Doe v. Burnham*, 6 F.3d 476, 479 (7th Cir. 1993). Thus, we undertake a two-part inquiry. First, we must determine whether the instruction misstates or insufficiently states the law. If the first requirement is met, we then determine whether the misstatement "confused or misled the jury causing prejudice to a litigant." *Id.* Mr. Maltby suggests that such prejudice occurred as a result of certain instructions given by the district court to which Mr. Maltby objected, and also as a result of the failure of the district court to give certain instructions proffered by Mr. Maltby.

The Task Force argues in response that error may not be predicated on the district court's failure to give Mr. Maltby's proffered jury instructions or on the district court's giving certain instructions over Mr. Maltby's objections because Mr. Maltby did not make a sufficient record in the district court. The Task Force correctly

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[14] *continued*

pursuant to the Constitution of the State of Illinois or the Intergovernmental Cooperation Act." This leads us to believe that the legislature of Illinois believed that the Task Force could be sued, and that it therefore provided these task forces with the same protection it afforded other local governmental bodies. Thus, although there are some aspects of the Task Force that, in the absence of statutory guidance, would counsel against a finding that it is an entity subject to suit, *see Timberlake v. Benton*, 786 F. Supp. 676, 682-83 (M.D. Tenn. 1992) (listing factors suggesting that task force not a person for purposes of § 1983), the legislature of Illinois considers the Task Force a local governmental entity in its own right. We shall not question this determination.

points out that the instruction conference in the district court was not memorialized in the record. Consequently, whatever transpired at that conference cannot satisfy the requirements of Federal Rule of Civil Procedure 51,[15] which requires a specific objection on the record.

We agree with the Task Force. It was the responsibility of counsel for Mr. Maltby to preserve for appeal any claims of error based on the jury instructions. Although arguably Mr. Maltby's submissions and objections to certain instructions are of record,[16] these actions of themselves do not satisfy the mandates of Rule 51, which requires that the objector state the ground on which he rests his objection. The proper procedure, we believe, in such circumstances, is for the party submitting the objection (or tendering the instruction) to file a statement pursuant to Federal Rule of Appellate Procedure 10.[17]

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[15] Rule 51 states:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of objection. Opportunity shall be given to make the objection out of the hearing of the jury.

[16] Mr. Maltby has produced copies of these instructions in his separate appendix. On these copies are notations from the district court that the instructions were submitted and rejected or given over objection.

[17] Appellate Rule 10 states in pertinent part:

> (c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable
>
> If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant

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This approach allows a party to preserve for appellate review proceedings in the district court for which no record was made or for which no transcript is available. Thus, upon realizing that objections to the jury instructions had not been incorporated in the record, Mr. Maltby's counsel could have supplemented the record pursuant to Rule 10 in order to preserve his specific objections for appeal. *See Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 842 (7th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).[18]

However, even if we were to hold that Mr. Maltby's claims of error were properly before us, we would not

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[17] *continued*

may prepare a statement of evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

[18] *Cf. Niehus v. Liberio*, 973 F.2d 526, 530 (7th Cir. 1992) (stating that Rule 51 does not require objection and statement of reasons on the record in situation in which "uncontradicted affidavit by defendants' lawyer . . . establishes that there was no violation of Rule 51").

We note, however, that it is the responsibility of the district court, if it conducts the instruction conference without a court reporter, to provide the parties with an opportunity to specifically object to jury instructions on the record. *See United States v. Murphy*, 768 F.2d 1518, 1536 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). Although *Murphy* spoke specifically to the context of a criminal trial, we believe similar policy concerns advise application of the rule in the civil setting. We have located no place in the record that the district court specifically asked the parties if they had objections to the jury instructions. There is some indication that the district court stated that it would allow written submissions. R.231 at 8. Because Mr. Maltby does not complain that he was not provided an opportunity to object to the instructions, there is no bar to waiver in this case.

reverse the jury verdict in favor of the Task Force on these grounds. Mr. Maltby's claims of error, when evaluated under the applicable standard, have no merit. Mr. Maltby first submits that the district court erred when it gave a modified version of his "failure to train" instruction.[19] Mr. Maltby admits that his instruction and the

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[19] Mr. Maltby proposed, and the court gave, the following instruction on "failure to train":

> Plaintiff claims that he was injured as a result of the Task Force's failure to properly train its officers and this alleged failure can be considered to be the official policy of the Task Force.
>
> Your verdict will be for plaintiff only if you find:
>
> *First*: That the Task Force's training program was inadequate to train its officers and employees to carry out their duties, and
>
> *Second*: The need for more training or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the Task Force can reasonably be said to have been deliberately indifferent to the need for such training; and
>
> *Third*: The failure to provide proper training was a cause of injury to the plaintiff.

R.224. Over Mr. Maltby's objection, the following explanatory instruction followed the "failure to train" instruction above:

> The inadequacy of police training of the employees of the West Central Illinois Task Force may serve as the basis for liability for a civil rights violation only when the failure to train amounts to deliberate indifference to the rights of persons with whom these police came into contact. To constitute deliberate indifference toward the plaintiff, the members of the board of directors of the West Central Illinois Task Force must have known of an actual high risk of arresting a suspect on less than probable cause and the board of directors must have consciously considered and rejected a course of conduct that knowingly would have reduced the risk of arresting a suspect on less than probable cause.
>
> That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability upon the West Central Illinois Task Force, because the shortcomings of the officer may

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given instruction are both derived from the Supreme Court's opinion in *City of Canton v. Harris*, 489 U.S. 378 (1989), and adequately reflect the law as stated in that case. Because Mr. Maltby makes no allegations that the instruction as given misstates the law, error cannot be predicated on this basis.

Mr. Maltby also claims error in the separate instruction, given at the defendants' request, on the issue of "deliberate indifference."[20] Mr. Maltby claims that the "deliberate indifference" instruction given is based on Eighth Amendment cases and involves a different standard for "deliberate indifference" from that in failure-to-train cases. Mr. Maltby argues that this court's opinion in *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir.

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[19] *continued*

have resulted from factors other than a faulty training program. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Adequately trained officers occasionally make mistakes. The fact that they do says little about the training program or the legal basis for holding the West Central Illinois Task Force liable.

R.224.

[20] The instruction as given reads:

When I use the term deliberate indifference, I mean that each defendant had actual knowledge of a serious and imminent threat to plaintiff's constitutional rights and consciously, knowingly or recklessly refused to do anything to protect the constitutional rights of plaintiff. Failure to understand the nature of the threat, or inadvertent failure to take action, or disbelief in the existence of the threat, does not constitute deliberate indifference. Negligence, or even gross negligence, on the part of a defendant will not establish a constitutional violation. The defendant's actions must have been deliberate or reckless in a criminal sense. Recklessness, in the pertinent sense, implies an act so dangerous that defendant's knowledge of the risk can be inferred and reflects an extreme or complete indifference to the value of human liberty.

R.224.

1990), distinguishes the standards in the two types of cases. Because, he continues, a legally unsound instruction was given, reversal is required. We cannot agree with Mr. Maltby's contentions. Although the instruction was not the model of clarity, we cannot say that the giving of this instruction so hampered the jury's understanding of the issues that it caused prejudice.[21]

Mr. Maltby also claims that he was prejudiced by the district court's failure to give several proffered instructions. Mr. Maltby first argues that the district court should have given his proposed instructions Nos. 53, 54, and 55 which defined "policymakers" as the Review Committee, the Task Force Director, and the Squad Leader. We believe that the instruction given adequately apprised the jury of who could be a policymaker.[22] It was clear from

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[21] Indeed, in *Gibson*, cited by Mr. Maltby, we stated:

> It is well established that the requirements for municipal liability based on policies of "inadequacy" are rigorous. As noted in *City of Canton*, municipalities may be held for "inadequate" policies "only where the failure . . . amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 1204; *cf. Duckworth v. Fanzen*, 780 F.2d 645, 653-55 (7th Cir. 1985) (for purposes of the eighth amendment's prohibition on cruel and unusual punishment, the "deliberate indifference" standard of culpability means either "deliberateness," or "recklessness" in the criminal law sense—both terms imply the defendants' knowledge of the risk of deprivation), *cert. denied*, 479 U.S. 816 (1986).

*Gibson*, 910 F.2d at 1522. Thus, this court did not find the standards so different that we could not use the Eighth Amendment articulation as an apt comparison to the failure to train articulation.

[22] The instruction as given states:

> "Official Policy or custom" may be established based on a single decision by a government policy maker if the single act:
>
> (1) Is a decision of the governing body, or
>
> (2) Is executed in compliance with formal rules or understandings that are intended to, and do, establish fixed plans of action to be followed under similar circumstances, consistently and over time, or
>
> (3) Is directed by those who establish governmental policy.

R.224.

the evidence presented at trial that only two parties could make policy for the Task Force: the Review Committee and the Task Force Director. *See* Tr. 345. Consequently, we do not believe that it was reversible error for the district court not to specify these bodies in the separate instruction.[23]

Finally, Mr. Maltby alleges error in the district court's failure to give his direct policymaker instruction.[24] We do not believe that the district court's failure to give this instruction restricted the jury's understanding of the issues before it. The jury was instructed adequately by those instructions already given and therefore no harm resulted from the district court's failure to so instruct.

b. denial of discovery requests

In addition to challenging the jury instructions, Mr. Maltby also claims that the district court abused its discretion when it refused to allow Mr. Maltby to pursue certain discovery requests. Specifically, Mr. Maltby alleges that the DCI is an agent of the Task Force as a result

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[23] With respect to Plaintiff's Instruction No. 55, which specified a Squad Leader as a policymaker, we uphold the district court's determination on a different ground. We do not believe that there was any evidence submitted at trial that spoke to the issue whether a Squad Leader could make Task Force policy. Thus, it certainly was not error for the court to so instruct the jury.

[24] This instruction reads:

> Plaintiff claims that the West Central Illinois Task Force, is liable to him for the constitutional deprivations that he alleges. You are instructed that the Task Force may be liable where you find that Plaintiff has been deprived of his constitutional rights and such deprivation was done pursuant to the Task Force's custom, policy, or decision. When the Plaintiff is injured as a result of Task Force's policy, custom, or decision, whether made by its policymakers or by those officials whose edicts or acts may fairly be said to represent official policy, the Task Force itself may be responsible for the injury that it caused.

of the Task Force Agreement. The DCI, continues Mr. Maltby, had knowledge that its identification procedures were inadequate as a result of a misidentification that spawned litigation in the case of *Frye v. O'Neill*, 520 N.E.2d 1233 (Ill. App.), *appeal denied*, 526 N.E.2d 829 (Ill. 1988). Because the DCI was an agent of the Task Force, the knowledge it had of this misidentification is imputed to the Task Force. Consequently, states Mr. Maltby, he should have been allowed to pursue discovery on this case on an agency theory.

We believe that Mr. Maltby's argument fails at a very fundamental level: Mr. Maltby has not established that the DCI is an agent of the Task Force. Mr. Maltby states in his brief that

> [w]hen the Illinois State Police signed the West Central Illinois Task Force Interagency Agreement, which stated its purpose was to create a multi-jurisdictional authority to be known as the West Central Illinois Task Force, the State Police became an agent of the Task Force as a matter of law.

Appellee/Cross Appellant's Br. at 18 (citations omitted). After carefully examining the Task Force Agreement, we cannot reach the same conclusion. The Agreement contains three sections that we find particularly instructive:

> I. PARTIES. Parties to this agreement are: McDonough County Sheriff's Department, Warren County Sheriff's Department, Adams County Sheriff's Department and Monmouth Police Department.[25]
>
> . . . .
>
> V. DUTIES OF THE DEPARTMENT OF STATE POLICE, DIVISION OF CRIMINAL INVESTIGATION (DCI). DCI agrees to supply the following facilities/ equipment/

[25] An addendum to the agreement was later added that included the Adams, Schuyler, and Pike County Sheriff's Departments and the Quincy Police Department as parties.

services to be utilized in support of Task Force activities.

A. Facilities to house the Task Force unit.

B. Training in pro-active enforcement techniques and covert investigative methods.

C. Specialized equipment and/or communications devices/ components.

D. Arrangements for assignment of "Inspector (non-code)" status and the issuance of credentials.

Credentials/ equipment/ components supplied by the Department of State Police, Division of Criminal Investigations (DCI) to any officer or participant must be surrendered to DCI upon termination of his/her affiliation with the Task Force or upon its disbandment.

. . . .

IX. OBLIGATIONS.

. . . .

B. The Illinois Division of Criminal Investigation shall provide covert agents, clerical personnel, office space and appropriate monies for the purchase of evidence during an investigation.

Mr. Maltby rather summarily states that this participation by the DCI in the Task Force makes the DCI an agent of the Task Force as a matter of law. The conclusion is not so obvious to us. Mr. Maltby has cited us no authority which provides that under Illinois law these activities make the DCI an agent of the Task Force. We often have stated that summary arguments unsupported by authority are waived. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitu-

tional issues)."), *cert. denied*, 112 S. Ct. 141 (1991). Similarly, in this case, Mr. Maltby has waived any agency argument by failing to point us to applicable law. Because Mr. Maltby has produced no authority that the DCI became an agent of the Task Force, the district court did not abuse its discretion in denying him discovery based on this theory.[26]

c. admissibility of expert testimony

Finally, Mr. Maltby argues that the district court abused its discretion when it limited his expert to testimony on general police procedures. "In general, a district court has broad discretion in determining whether evidence should be admitted or excluded. In particular, a district court has broad discretion in determining whether to exclude expert witness testimony. We therefore will reverse the district court's ruling which limited the expert's testimony only if it abused its discretion." *United States v. Price*, 995 F.2d 729, 731 (7th Cir. 1993).

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[26] Mr. Maltby cites numerous cases on agency law generally that explain the operation of the agency relationship. These, however, are wholly irrelevant to the analysis until the agency relationship is established.

Mr. Maltby also argues that the doctrine of collective knowledge applies; as a result, the Task Force is imputed with all knowledge of the DCI. Mr. Maltby miscomprehends the doctrine. The collective knowledge doctrine is designed to allow law enforcement personnel from the same agency, or from different jurisdictions, to rely on the probable cause determinations of one another in order to apprehend specific suspects. *See generally United States v. Celio*, 945 F.2d 180 (7th Cir. 1991). "The rule exists because, in light of the complexity of modern police work, the arresting officer cannot always be aware of every aspect of an investigation; sometimes his authority to arrest a suspect is based on facts known only to his superior or associates." *United States v. Valez*, 796 F.2d 24, 28 (2d Cir. 1986) (citing *United States v. Canieso*, 470 F.2d 1224, 1230 n.7 (2d Cir. 1972)), *cert. denied*, 479 U.S. 1067 (1987). The rule has never been used to impute general knowledge of identification or other general police procedures from one agency to the other in order to impute liability.

Mr. Maltby fails to apprise this court of what testimony his expert was prevented from giving. Dr. Steven Egger was allowed to testify on identification techniques and their importance, Tr. 479-80, follow-up procedures, Tr. 481, and numerous other subjects. Without further elaboration from Mr. Maltby, it is impossible for us to discern the shortcomings of this testimony. If Mr. Maltby is complaining that his expert was not allowed to testify to the minutiae regarding how an undercover drug operation works, the district court did not abuse its broad discretion in refusing to allow Dr. Egger to testify on these matters. Nothing in Dr. Egger's background renders him qualified to testify on this very narrow issue. There is no doubt that Dr. Egger was an expert as to general police procedure; it was within the district court's discretion to limit his testimony to those areas.

## Conclusion

For the foregoing reasons, the jury verdict against Inspector Winston is reversed because he is qualifiedly immune from suit for his actions. However, the judgment as a matter of law for Sheriff Bond and the jury verdict for the Task Force is affirmed.

AFFIRMED IN PART,
REVERSED IN PART.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: September 14, 1994

BEFORE:

Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable PAUL E. PLUNKETT, District Judge*

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Nos. 92-1846, 92-1958 and 92-3447

KERRY L. MALTBY,
Plaintiff-Appellee/Cross-Appellant

v.

MARTY WINSTON,
Defendant-Appellant/Cross-Appellee

and

DEWAYNE BOND, Sheriff of
Schuyler County and WEST
CENTRAL ILLINOIS TASK FORCE,
Defendants/Cross-Appellees

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Appeal from the United States District Court
for the Central District of Illinois, Springfield Division
No. 88 C 3093, Richard Mills, Judge

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The judgment of the District Court is AFFIRMED in part and REVERSED in part, with costs, in accordance with the decision of this court entered on this date.

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* The Honorable Paul E. Plunkett, of the United States District Court for the Northern District of Illinois, is sitting by designation.

[Filed February 27, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

KERRY LEE MALTBY

v.

DEWAYNE BOND, Sheriff of Schuyler County
MARTY WINSTON and WEST CENTRAL ILLINOIS
TASK FORCE

---

CASE NUMBER: 88-3093

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☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Pursuant to Order entered by The Honorable Richard Mills on February 19, 1992: Judgment is entered for Defendant Dewayne Bond, Sheriff of Schuyler County, and against Plaintiff, Kerry Lee Maltby. Pursuant to jury verdict on February 20, 1992: Judgment is entered for Plaintiff, Kerry Lee Maltby, and against the Defendant, Marty Winston; Judgment is entered for the Defendant, West Central Illinois Task Force, and against the Plaintiff, Kerry Lee Maltby. Pursuant to jury verdict on February 26, 1992: Plaintiff,

Kerry Lee Maltby, is awarded compensatory damages in the sum of $50,000 against Defendant, Marty Winston; Plaintiff, Kerry Lee Maltby, is awarded punitive and exemplary damages in the sum of $2,300 against Defendant, Marty Winston.

Date: February 27, 1992

Clerk: /s/ John M. Waters

APPROVED: /s/ Richard Mills
U.S. District Judge

(By) Deputy Clerk: /s/ Gloria Utsengic

[Filed August 31, 1992]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 88-3093

KERRY LEE MALTBY,

Plaintiff,

v.

DEWAYNE BOND, Sheriff of Schuyler County, Illinois, MARTY WINSTON and WEST CENTRAL ILLINOIS TASK FORCE,

Defendants.

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Plaintiff's petition for attorney's fees.

Defendant objects to the fee petition and raises several issues. Plaintiff's major contention is that the claims against the Defendants were unrelated and, therefore, since Plaintiff prevailed only against Defendant Winston, he should only recover for time spent on that claim. *See Hinsley v. Eckerhart*, 461 U.S. 424 (1983). In that case, the Supreme Court stated that there is "no certain method of determining when claims are 'related' or 'unrelated'." *Hinsley*, 461 U.S. at 437 n.12. The Seventh Circuit has stated that:

> the starting point for separating an *un*related, unsuccessful claim from a related, unsuccessful claim is to determine whether a particular unsuccessful claim shares a "common core of facts" with the successful claim or is based on a "related legal theory." We believe a useful tool for making this determination is to focus on whether the claims seek relief for essentially the same course of conduct. Under this analysis, an unsuccessful claim will be *un*related to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.

*Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1279 (1983).

Although the theories on which Plaintiff sought to hold the different Defendants liable varied, all were intended to remedy the same course of conduct, i.e. the misidentification and detention of the Plaintiff for approximately two months. We therefore find that the claims alleged against the three Defendants were in fact related. The Supreme Court has indicated that the most critical factor in awarding attorney's fees is the degree of success obtained. *See Hinsley v. Eckerhart*, 461 U.S. 424 (1983); *Texas State Teacher's Assoc. v. Garland Independent School Dist.*, 489 U.S. 782 (1989). The size of the jury verdict does not, however, determine the amount that can be awarded in attorney's fees. In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the Supreme Court upheld an attorney's fees award almost eight times the amount of the plaintiff's recovery. The Court noted that the defendants could have avoided the bulk of the attorney's fees by making a settlement offer in a timely manner. Having however litigated the case tenaciously, defendants could not be heard to

complain about the amount of time plaintiff's counsel spent in response. This case is similar; the Plaintiff's initial settlement demand was for $15,000 including attorney's fees. After Defendants' motion to dismiss was denied, Plaintiff withdrew the initial settlement demand and made a second demand for $25,000 inclusive of attorney's fees. Shortly before this case went to trial, when the Court file measured several feet thick and the case had been dragging on for three years, Defendants offered to settle the case for $5,000 which was supposed to include the amount of attorney's fees. While this case may well have been overdiscovered, given the tenacious manner in which the Defendants fought this suit, we are unwilling to say that the amount of discovery involved was unreasonable.

Plaintiff's primary counsel has sought to be compensated at his current rate of $90 per hour rather than his earlier rate for part of this litigation of $85 and $75 an hour, as permitted by *Missouri v. Jenkins*, 491 U.S. 274 (1989). Plaintiff also asked for a fee multiplier of 133% in accordance with *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*, 483 U.S. 711 (1987).

Defendant has challenged the appropriateness of a multiplier but has not challenged Plaintiff's claim that he should be compensated at his current rate to account for the delay in recovery of his fees. In response to Defendant's objection, Plaintiff has indicated that he would be willing to compromise by dropping his request for a fee multiplier if he is compensated for his time at his current billing rates. The Court accepts this compromise. Under *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992), applying a fee multiplier in this case would be suspect; *City of Burlington* held that such multipliers were not permitted under the fee shifting provisions of the Solid Waste Disposal Act and the Clean Water Act. Considering the length

of time between the filing of the complaint in this case and the final judgment, Plaintiff's request for compensation based on his attorney's current rate is quite reasonable.

Defendant made numerous challenges to Plaintiff's claim for attorney time for various depositions that Defendant asserts were unnecessary and to various claims for minor expenses. After carefully considering the challenges and Plaintiff's response, we find that Plaintiff has shown that the claimed attorney's fees and expenses are all reasonable.

*Ergo*, Plaintiff's petition for attorney's fees is ALLOWED.

Plaintiff is awarded $61,461 to compensate Plaintiff for 682.9 hours of Mr. Lanterman's time prior to and including the filing of the fee petition at a rate of $90 per hour; $2,511 to compensate Plaintiff for 27.9 hours of attorney's time subsequent to the filing of the fee petition; $4,168 to compensate for 111.4 hours devoted to this case by paralegals and other attorneys in Mr. Lanterman's firm; and $5,946.24 in cost and expenses. The total award for attorney's fees and expenses is $74,086.24.

ENTER: 28 August, 1992.

FOR THE COURT:

/s/ Richard Mills
United States District Judge

[Filed August 31, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE
FOR ATTORNEY'S FEES

KERRY LEE MALTBY

v.

DEWAYNE BOND, Sheriff of Schuyler County, Illinois, MARTY WINSTON, and WEST CENTRAL ILLINOIS TASK FORCE

CASE NUMBER: 88-3093

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Pursuant to an order entered by the Honorable Richard Mills: Plaintiff is awarded $61,461 to compensate Plaintiff for 682.9 hours of Mr. Lanterman's time prior to and including the filing of the fee petition at a rate of $90 per hour; $2,511 to compensate Plaintiff for 27.9 hours of attorney's time subsequent to the filing of the fee petition; $4,168 to compensate for 111.4 hours devoted to this case by paralegals and other attorneys in Mr. Lanterman's firm; and $5,946.24

in cost and expenses. The total award for attorney's fees and expenses is $74,086.24.

Date: August 31, 1992
Clerk: /s/ John M. Waters
(By) Deputy Clerk: /s/ Christy Taylor

[Filed September 24, 1992]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 88-3093

KERRY LEE MALTBY,

Plaintiff,

v.

DEWAYNE BOND, SHERIFF OF SCHUYLER COUNTY, et al.,

Defendants.

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Plaintiff's motion to amend the judgment entered on August 31, 1992, pursuant to Fed. R. Civ. P. 59(e). The Court will allow the motion and amend the judgment to specify that the judgments entered on August 31, 1992, and on February 27, 1992, in favor of Plaintiff are against Defendant Marty Winston.

*Ergo*, Plaintiff's motion to amend judgment (d/e 264) is ALLOWED. The judgment entered by this Court on August 31, 1992, is hereby amended to specifically name Defendant Marty Winston as the Defendant against whom the judgment was entered.

ENTER: 24 Sept., 1992.

FOR THE COURT:

/s/ Richard Mills
United States District Judge

[Filed September 24, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JUDGMENT IN A CIVIL CASE
FOR ATTORNEY FEES

KERRY LEE MALTBY,

v.

DEWAYNE BOND, Sheriff of Schuyler County, Illinois; MARTY WINSTON, and WEST CENTRAL ILLINOIS TASK FORCE,

CASE NUMBER: 88-3093

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Pursuant to Order entered by the Honorable Richard Mills, judgment is AMENDED as follows: Judgment is entered in favor of the Plaintiff and against Defendant Marty Winston: Plaintiff is awarded $61,461.00 to compensate Plaintiff for 682.9 hours of Mr. Lanterman's time prior to and including the filing of the fee petition at a rate of $90.00 per hour; $2,511.00 to compensate Plaintiff for 27.9 hours of

attorney's time subsequent to the filing of the fee petition; $4,168.00 to compensate for 111.4 hours devoted to this case by paralegals and other attorneys in Mr. Lanterman's firm; and $5,946.24 in costs and expenses. The total award for attorney's fees and expenses is $74,086.24.

Date: September 24, 1992

Clerk: /s/ John M. Waters

(By) Deputy Clerk: /s/ Barbara G. Wagner

App. 45

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 4, 1994.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. PAUL E. PLUNKETT, District Judge*

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Nos. 92-1846, 92-1958 and 92-3447

KERRY L. MALTBY,
Plaintiff-Appellee-Cross-Appellant,

v.

MARTY WINSTON,
Defendant-Appellant,

and

DEWAYNE BOND, Sheriff of
Schuyler County and WEST
CENTRAL ILLINOIS TASK FORCE,
Defendants-Cross-Appellees.

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Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 88 C 3093, Richard Mills, Judge.

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* The Honorable Paul E. Plunkett, of the United States District Court for the Northern District of Illinois, is sitting by designation.

## ORDER

On consideration of the corrected petition for rehearing and suggestion for rehearing en banc filed by the plaintiff-appellee-cross-appellant on October 6, 1994, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition.

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

[Filed September 25, 1991]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 88-3093

KERRY LEE MALTBY,

Plaintiff,

v.

SCHUYLER CITY SHERIFF; MARTY WINSTON; and WEST CENTRAL ILLINOIS TASK FORCE,

Defendants.

## RECOMMENDATION

This recommendation is being submitted pursuant to Rule 3, (A) (7) of the Rules of the United States District Court for the Central District of Illinois.

## INTRODUCTION

Pending before the Court is Defendants', Bond and Winston, joint Motion for Summary Judgment based on the issue of qualified immunity (d/e 71).

## II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants assert in Paragraph 5 of their Motion for Summary Judgment that the Plaintiff was arrested pursuant to a valid arrest warrant and absent an attack

on the validity of that warrant, the Plaintiff is barred from claiming the actions of the Defendants violated the Plaintiff's constitutional rights. Defendants also argue that the discovery shows the Plaintiff did not talk to Winston after Plaintiff's arrest about his claim of misidentification and the Plaintiff only discussed his claim of misidentification with Defendant Bond once after Plaintiff's arrest. (See Motion for Summary Judgment, Para. 6.) The Defendants argue that based on the foregoing facts that their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known and that the Defendants are entitled to qualified immunity under the holding of *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982). (See Motion for Summary Judgment, Para. 7.)

Defendants in their Memorandum of Law in support of the Motion for Summary Judgment argue that the limited contact between Plaintiff and Defendants after his arrest regarding his claim of misidentification does not establish facts which show that the events that led to the Plaintiff's arrest and incarceration satisfy the "shock the conscious" liability standard set forth in the case of *Rochin v. California*, 342 U.S. 165, 172 (1952) upon which this Court has relied in denying Defendants' previous Motion to Dismiss. (October 4, 1988, Order.). Defendants also argue that Plaintiff must show Defendants had a duty to investigate his claim of misidentification in order to prevail on his claim and that such a duty was not clearly established by law as of the date of Plaintiff's arrest.

## III. PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff's Response to Defendants' Motion for Summary Judgment summarizes existing material facts as follows:

1. Defendant Winston served as a surveillance officer for the undercover transaction which ultimately led to Plaintiff's arrest; (Response pgs. 1, 2.)

2. Michael Sage served as the officer who had face to face contact with the suspect in the undercover transaction which led to Plaintiff's arrest; (Response pgs. 2, 3.)

3. The car driven by the suspect was registered to a Virgil Riley. Defendant Winston was not aware of any relationship between Riley and Maltby; (Response pgs. 3, 4.)

4. After the undercover transaction, Maltby was interviewed by Defendant Winston prior to Maltby's arrest. Maltby denied participating in the undercover transaction when he was interviewed. Maltby was not detained after that interview; (Response pg. 4.)

5. Maltby was arrested on August 7, 1987, and held in custody until October 6, 1987; (Response pg. 9)

6. Pursuant to the request of someone from the West Central Illinois Task Force, (hereinafter "Task Force"), Defendant Winston testified at Maltby's preliminary hearing instead of Sage. During the preliminary hearing, a man and a woman in their late fifties or early sixties talked with Maltby's public defender and advised the public defender they could provide an alibi for Maltby. The State's Attorney overheard the "alibi" part of the conversation. Immediately after the preliminary hearing, the State's Attorney advised Defendant Winston of the alibi claim, gave him the names and addresses of the alibi wit-

nesses, and instructed Defendant Winston to question them; (Response pgs. 4, 5, 6.)

7. The State's Attorney made at least one follow-up request for a report on Defendant Winston's interview with Maltby's alibi witnesses after the preliminary hearing. Defendant Winston had not interviewed the witnesses when he was contacted and did not offer any explanation for not having done so; (Response pg. 6.)

8. Ultimately, Defendant Winston and another deputy interviewed Maltby's alibi witnesses. The witnesses told Defendant Winston that Maltby had been building a barbecue pit the day the undercover transaction took place. No written report was made of this interview; (Response pgs. 6, 7.)

9. At some point after interviewing the alibi witnesses, Defendant Winston showed Sage, Maltby's mug shot at the DCI Headquarters in Macomb, Illinois. Sage stated without expressing any reservation that Maltby was not the person who was involved in the undercover transaction. The State's Attorney was advised of this development. That is the first time the State's Attorney was aware Sage hadn't personally viewed Maltby; (Response pgs. 7, 8.)

10. After Sage viewed Maltby's photograph, Sage viewed Maltby through one-way glass at the Fulton County jail. After looking at Maltby for three seconds, Sage determined Maltby was not the person who had participated in the undercover transaction. Sage based his determination in part on the fact that Maltby had tattoos and also that the suspect in the undercover transaction had an acne problem and Maltby did not. Maltby was released from jail shortly after this viewing; (Response pg. 8.)

11. As an aside, Sage indicated at some point in time, the informant who set up the undercover transaction which led to the Plaintiff's arrest, was caught "playing both sides of the fence, so to speak and we sent him to prison". The date the informant's deceit was discovered is not shown in the informant's file; (Response pg. 9.)

12. Maltby was held in the Fulton County Jail because Schuyler County did not have a jail at that time; (Response pgs. 9, 10.)

13. The Task Force Review Committee established guidelines for the operation of the Task Force. The Review Committee was composed of the head of each law enforcement agency that participated in the Task Force. Defendant Bond signed the Task Force Interagency Agreement for Schuyler County; (Response pg. 10.)

14. The Director of the Task Force encouraged participating agents to talk to their commanding officers on a daily basis regarding Task Force activities. Defendant Winston testified he followed this recommendation and talked to Defendant Bond sometimes daily and other times two or three times per week about Task Force activities; (Response pg. 11)

15. Defendant Bond was told by Maltby, no later than October 1, 1987, that Maltby was innocent and the police has the "wrong guy". October 1 was a Thursday. Defendant Bond called DCI Headquarters and stated he wanted the Task Force to have the agent involved in the undercover transaction make a positive identification of Maltby; (Response pg. 12.)

16. Defendant Bond believes he was told the agent who participated in the undercover transaction was on vacation. The work records for Sage show he worked every-

day between September 28 and October 6, except for Sunday, September 28, Saturday, October 3, and Sunday, October 4. October 6 was a Tuesday; (Response pg. 12.)

17. Defendant Bond and Defendant Winston both indicated that utilizing common sense applies in police work. Defendant Bond believed common sense required a positive identification to be made of a suspect who was being held in jail; (Response pg. 14.)

18. Other officers affiliated with the Task Force indicated good police work is basic fact-finding. According to one of the officers, following up on exculpatory evidence would be a high priority. (Response pg. 14.)

## IV. DEFENDANTS' REPLY

The Defendants asked for and received leave of this court to file a reply to Plaintiff's response to Defendants' Motion for Summary Judgment. Defendants did not file a reply to the Plaintiff's Response. Therefore, it appears Defendants have not questioned the existence of the facts as claimed by Plaintiff.

## V. LEGAL ANALYSIS – ARREST WARRANT AND SHOCK THE CONSCIENCE ANALYSIS

Subsequent to the *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982) case relied upon by Defendants, the U.S. Supreme Court held that the existence of an arrest warrant does not automatically bar a claim pursuant to 42 U.S.C. Section 1983. *See Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 1098 (1986). In addition, the Seventh Circuit Court of Appeals has held a finding of probable cause by a trial judge in a criminal case does not collaterally estop the Plaintiff from beinging a Section 1983 action which chal-

lenges the integrity of the evidence that was presented at the probable cause hearing. *See Bailey v. Andrews*, 811 F.2d 366, 370 (7th Cir. 1987) and *Whitley v. Seibel*, 676 F.2d 245, 248, 249, 250 (7th Cir. 1982). Therefore, Plaintiff's cause of action is not precluded as a matter of law because his arrest was made based on an arrest warrant or because probable cause was found at his preliminary hearing. The Defendants' argument to the contrary is rejected because it is not in accord with applicable law.

Addressing the *Rochin v. California*, 342 U.S. 165, 172 (1952) "shock the conscience" analysis previously adopted by this Court's October 4, 1988 Order, the discovery cited by the Plaintiff regarding the manner in which Plaintiff's arrest was effectuated shows there is a genuine issue of material fact as to whether the defendants' actions and/or omissions in this case satisfy the "shock to conscience" analysis. Plaintiff was arrested and held in jail for nine weeks as a result of Defendant Winston's identification of Maltby. Defendant Winston's identification proved to be wrong by Sage. This Court is not prepared to say this conduct does not "shock the conscience" as a matter of law, which is the relief Defendants request. The Seventh Circuit Court of Appeals has recognized the validity of the "shock the conscience" analysis previously adopted by this Court. *See Coleman v. Frantz*, 754 F.2d 719, 723-725 (7th Cir. 1985).

## VI. LEGAL ANALYSIS – QUALIFIED IMMUNITY

Regarding the issue of the state of the law at the time of the Plaintiff's incarceration, it has long been the law that in the arrest of a citizen there needs to be probable cause to believe criminal conduct was engaged in prior

to his arrest. *See Llanguno v. Mingey*, 739 F.2d 1186, 1194 (7th Cir. 1984). An arrest and detention is unlawful unless probable cause for the arrest existed. *See BeVier v. Hucal*, 806 F.2d 123, 126, 127, 128 (7th Cir. 1986); *see also, Frye v. O'Neill*, 166 Ill.App.3d 963, 520 N.E.2d 1233, 1241, 1243, 117 Ill.Dec. 882, 890, 892 (4th Dist. 1988) and *Mack v. First Security Bank of Chicago*, 158 Ill.App.3d 497, 511 N.E.2d 714, 718, 110 Ill.Dec. 537, 541 (1st Dist. 1987).

In addition, conduct by police officers which intentionally misleads or involves misrepresentation of facts and circumstances to the prosecuting attorney can establish liability under 42 U.S.C. Sec. 1983. *See Whitley v. Seibel*, 613 F.2d 682, 686 (7th Cir. 1980). The failure to investigate in a reasonable fashion a plausible alibi given by a person in custody and misrepresentations to the prosecuting attorney regarding the alibi can also establish liability. *See Whitley v. Seibel*, 676 F.2d 245, 248, 249 and Footnote Number 4 (7th Cir. 1982). Furthermore, police officers are required to use common sense in conducting an investigation. *See Moore v. The Marketplace Restaurant*, 754 F.2d 1336, 1346 (7th Cir. 1985).

In terms of the length of a detention, the Seventh Circuit Court of Appeals has held that detention of as little as four hours prior to release required an explanation by the police. *Moore v. The Marketplace Restaurant*, 754 F.2d 1336, 1351, 1352 (7th Cir. 1985); *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 437 (7th Cir. 1986); *Mustfov v. Superintendent of Chicago Police Department*, 733 F.Supp. 283, 298, 299 (N.D. Ill. 1990). The Seventh Circuit Court of Appeals has also held that an eleven hour delay in releasing a suspect due to an administrative hold up created a question of fact regarding the reasonableness

of the detention for a jury to resolve. *Lewis v. O'Grady*, 853 F.2d 1366, 1369, 1370 (7th Cir. 1988).

By and large all of these cases were decided prior to the time of the undercover investigation which led to the Plaintiff's arrest. To the extent that any of the cases were decided after the undercover transaction occurred, the cases did not establish "new" law. In point of fact, most of the cases decided after the undercover transaction occurred specifically cited with approval and relied on the other cases that were decided prior to the undercover transaction. Making a positive identification of a suspect falls within the scope of common sense in police work. Reasonably well-trained police officers know or should know of the need to make sure the man they arrest is the one involved in the offense under investigation. Therefore, the Defendants' claim that their conduct did not violate clearly established rights of which a reasonable police officer would have known is rejected.

It does not appear to be questioned that the Plaintiff was not the man actually involved in the undercover transaction. The Plaintiff was held in jail for a total of nine weeks before this determination was made. There clearly exists a genuine issue of material fact as to the reasonableness of the Plaintiff's incarceration. Based on the discovery, there is a genuine issue of material fact as to whether there was probable cause to believe Plaintiff was the person involved in the transaction. The Defendants' argument that they had little direct contact with the Plaintiff and that they had no duty to investigate Plaintiff's claim of misidentification after his arrest fails to address the condition precedent for a valid arrest, namely, probable cause. It is the police officers' duty to establish probable cause to believe an offense has occurred and the arrestee is a person involved in the offense *prior* to an

arrest in order to justify an arrest. Silence by an arrestee after his arrest doesn't excuse the police officers initial duty to establish probable cause. The Defendants argument places the cart before the horse. It focuses on events after arrest. The argument presupposes probable cause was established before the arrest. The issue of probable cause in this case presents a genuine issue of material fact.

If a police officers' actions have been instrumental in a person's arrest and confinement, the police officers are responsible for the natural consequences of their acts. *Jones v. City of Chicago*, 856 F.2d 985, 993, 994 (7th Cir. 1988). Therefore, Defendant Winston can be liable for Plaintiff's incarceration regardless of whether Plaintiff communicated with Defendant Winston after Plaintiff's arrest or not. Furthermore, based on the record, Plaintiff did profess his innocence to Defendant Winston prior to Plaintiff's arrest and Defendant Winston was apprised of Plaintiff's alibi claim the day of Plaintiff's preliminary hearing. Defendant Winston had knowledge of Plaintiff's claim regardless of the actual source of the knowledge or timing. Therefore, his no contact argument which is implicitly based on a claim of lack of knowledge must fail.

Thus, this Court finds that the Defendant Winston's Motion for Summary Judgment should be denied, insofar as this Motion is concerned, as there are genuine issues of material fact.

## VII. SEPARATE ISSUES – DEFENDANT BOND

The analysis set forth above applies likewise to Defendant Bond. At a minimum, Defendant Bond was aware of Plaintiff's claim of innocence five days prior to the

Plaintiff's release. The Defendant is required to explain the reason for this delay in Plaintiff's release. *See Moore v. The Marketplace Restaurant, id. Gramenos v. Jewel Companies, id. Mustfov v. Super. of Chicago Police Dept.*; and *Lewis v. Grady, id.* The Court cannot say at this point, based on the record before it on this Motion, that there is no genuine issue of material fact over Defendant's explanation that the reason for this five day delay was due to the unavailability of Sage and that Defendant is entitled to this Motion being allowed as a matter of law.

In addition, the case of *BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986), which was tried by this Court without a jury, rebuts Defendant Bond's argument that he had no duty to investigate Plaintiff's claim of misidentification. The Seventh Circuit Court of Appeals held as follows in that case:

> "The continuation of even a lawful arrest violates the Fourth Amendment when the police discover additional facts dissipating their earlier probable cause." 806 F.2d at 128.

Assuming arguendo that the original arrest was based on probable cause, liability still can be imposed on Defendant Bond, if the trier of fact determines that Plaintiff's claim of innocence which was communicated to Defendant Bond dissipated any prior probable cause for Plaintiff's arrest. Therefore, Defendant Bond's claim he has no duty regarding exculpatory information after Plaintiff's arrest is not valid. This creates a genuine issue of material fact in addition to the genuine issue regarding probable cause recognized in Section VI. The five day interval, standing alone, precludes entry of Summary Judgment in Defendant's favor. In addition, Defendant Winston's testimony indicates Defendant Bond may have known, prior to October 1, 1987, about various shortcomings in the series

of events which led to Plaintiff's arrest. This creates another genuine issue of material fact.

Furthermore, Plaintiff included in his cause of action against Defendant Bond allegations based on a failure to train theory of liability. (See paragraphs 13, 14, and 15 of Count II of Plaintiff's First Amended Complaint.) This theory of liability was not addressed in the Motion for Summary Judgment filed by Defendant Bond. Also, although Defendant Bond raised the defense of qualified immunity in his Motion for Summary Judgment, he did not file that as an affirmative defense. These omissions on the Defendant's part make the requested relief questionable.

However, addressing the failure to train theory of liability, briefly, the discovery shows Defendant Bond was a member of the West Central Illinois Task Force Review Committee. This Committee was responsible for establishing guidelines for Task Force operations. This raises a question as to whether Defendant Bond was a policymaker. Policymakers can be liable for acts of subordinates, not on a respondeat superior theory, but as a result of personal involvement. If supervisors know about conduct, facilitate it, approve it, condone it, or turn a blind eye to it for fear of what they might see, they are liable. *Jones v. Chicago*, 856 F.2d 985, 992, 993 (7th Cir. 1988). The record demonstrates a genuine issue of material fact as to whether the Defendant Bond turned a blind eye to the series of events that led to Plaintiff's incarceration.

Finally, Defendant Winston served as a deputy for Defendant Bond in the Schuyler County Sheriff's Office prior to participating in the Task Force. Liability for failure to train is based on the deliberate indifference to constitutional rights standard. *See City of Canton v. Harris*, 109 S.Ct. 1197, 1204, 1206 (1989). It appears the method of

investigation and identification utilized by Defendant Winston raises a question of fact regarding the propriety of his training. At this point, a genuine issue of material fact exists as to whether Defendant Bond or the Defendant Task Force would be responsible for any deficiencies that may exist in the Defendant Winston's training in these areas.

## ORDER

It is recommended that Winston's and Bond's Motion for Summary Judgment (d/e 71) be denied.

The parties are advised that pursuant to Title 28, U.S.C., Section 636(b), they have ten (10) days after service to file written objections to this Recommendation.

Dated this 24th day of September, 1991.

/s/ Charles H. Evans
United States Magistrate Judge

[Filed October 31, 1991]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 88-3093

KERRY LEE MALTBY,

Plaintiff,

v.

DEWAYNE BOND, SHERIFF OF SCHUYLER COUNTY, et al.,

Defendant.

ORDER ADOPTING
MAGISTRATE'S RECOMMENDATIONS

RICHARD MILLS, District Judge:

The recommendation, and able reasons therefor, of United States Magistrate Judge Charles H. Evans, filed herein on September 25, 1991, are adopted by the Court and will be followed.

Pursuant to 28 U.S.C. §636(b)(1), this Court has made a *de novo* review of the objections to the Magistrate's recommendation filed herein (d/e 135) and after careful consideration finds them to be both a re-argument of matters already presented to the Magistrate, and without merit.

*Ergo*, Defendants' Motion for Summary Judgment (d/e 71) is DENIED.

ENTER: 31 October, 1991.

FOR THE COURT:

/s/ Richard Mills
United States District Judge

[Filed January 3, 1992]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 88-3093

KERRY L. MALTBY,

Plaintiff,

v.

DEWAYNE BOND, SHERIFF OF SCHUYLER COUNTY, ILLINOIS, MARTY WINSTON, and WEST CENTRAL ILLINOIS TASK FORCE,

Defendants.

## MOTION FOR RECONSIDERATION

COMES NOW the defendant, Marty Winston, by and through his attorney, ROLAND W. BURRIS, Attorney General for the State of Illinois, and hereby files this Motion for Reconsideration. In support thereof, the following statements are made.

1. Defendant, Marty Winston, through his attorney at the time, filed a Motion for Summary Judgment on or about March 1991.

2. On or about May 20, 1991, the Office of the Illinois Attorney General assumed the defense for Marty Winston.

3. The Motion for Summary Judgment was denied after Objections to the Report and Recommendation were filed.

4. The Motion for Summary Judgment did not contain information that was elicited through discovery after the motion was filed.

5. Defendant files this Motion for Reconsideration in good faith and not for the purpose of delay.

____ALLOWED

X___DENIED /s/ Richard Mills
1/6/92 U.S. District Judge

[Filed February 5, 1992]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 88-3093

KERRY LEE MALTBY,

Plaintiff,

v.

DEWAYNE BOND, SHERIFF OF SCHUYLER COUNTY, et al.,

Defendant.

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on a plethora of motions filed after the final pre-trial conference. This order resolves four of those motions.

Defendants have filed a Joint Motion for Reconsideration. After reviewing the motion and the response, the Court finds that the motion is merely a reargument of positions already presented to the Court. The Joint Motion for Reconsideration will be denied.

Plaintiff filed a Request for Ruling and New Trial Setting. Plaintiff's request for a ruling relates to his emergency motion for deposition. The Court earlier withheld ruling on this motion to allow Defendants to file a response. The matter being ripe for ruling the "request" will be granted. Plaintiff's request for a new trial setting is, in legal vernacular, a motion for a continuance. Several grounds are put forth for the continuance, including the fact that an important witness is currently on a pre-booked

vacation. Following return from her vacation on or around February 11, 1992, this witness is scheduled for surgery and will not be recovered until February 17. Plaintiff's counsel suggests that it may be possible to start the case sometime between February 12 and February 17 and indicates that he is willing to present this witness out of his previously intended order. In any event, the motion to continue, titled as a "request for new trial setting" will be allowed until at least February 12, 1992.

Plaintiff's Emergency Motion for Depositions seeks to redepose Sage, Winston and a representative of the Task Force to explore corrected information relating to confidential informant Haskins that was revealed in supplemental interrogatory answers provided around the time of the final pre-trial conference. As limited redeposition of the persons involved will not delay the trial and will eliminate any prejudice to Plaintiff that may have been caused by the original incorrect interrogatory answers, the Emergency Motion for Depositions will be allowed.

Counsel have indicated to the Court that, if ordered, the depositions could be taken on Wednesday, February 5, 1992. The Court leaves it to counsel to arrange an agreeable time.

Plaintiff's First Motion in Limine seeks to bar evidence relating to (a) the manner in which Maltby's counsel in the state court proceeding handled the preliminary hearing, (b) the ruling of the state court at the preliminary hearing, and (c) the opinion of Plaintiff's counsel in state court of Plaintiff's alibi claim.

In support of this motion, Plaintiff argues that the preliminary hearing did not occur until four weeks after the arrest and therefore is irrelevant to the issue of whether the police possessed probable cause at the time of the arrest. Plaintiff also argues that not all pertinent informa-

tion was revealed by the police when they procured the warrant or at the preliminary hearing.

While the issues raised by Plaintiff are valid, they do not justify barring the evidence in question. The evidence Plaintiff seeks to bar may be relevant to issues other than whether there existed probable cause for the arrest. Plaintiff will have ample opportunity to present to the jury any evidence he has that the police did not present all the pertinent facts when obtaining the warrant. Plaintiff can also point out when various pieces of evidence were learned by the authorities.

Plaintiff's reliance on *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984) to keep out any evidence relating to the preliminary hearing appears misplaced. *Zipkin* held that it was error to allow a Judge to testify on a question of law. As the Court reads Plaintiff's various motions, they are not alleging that the judicial officers acted incorrectly, but that the police failed to provide them with complete information.

Plaintiff's First Motion in Limine will be denied.

*Ergo*, Defendants' Joint Motion for Reconsideration (d/e 191) is DENIED.

Plaintiff's Request for Ruling and New Trial Setting (d/e 205) is GRANTED. Trial of this matter is CONTINUED until at least February 12, 1992.

Plaintiff's Emergency Motion for Depositions (d/e 185) is ALLOWED.

Plaintiff's First Motion in Limine (d/e 186) is DENIED.

ENTER: 4 Feb., 1992.

FOR THE COURT:

/s/ Richard Mills
United States District Judge

## EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF FEBRUARY 19 & 26, 1992

* * * * *

[614] you I didn't want to rule on any of these motions until everybody had full opportunity to flesh this record out to the totality. It's all in here now. Everybody has rested and there is not in my estimation a real, even a scintilla of evidence that directly ties in Sheriff Bond under Count 2 into this ballgame.

So the short answer is then that the motion for judgment as a matter of law is allowed. And Sheriff Bond is hereby dismissed as a Defendant in this cause and judgment is entered accordingly.

You will draw, Mr. Londrigan, the proper and necessary order in that regard?

MR. LONDRIGAN: I will, Your Honor.

THE COURT: And submit it to me, please.

MR. LONDRIGAN: I will, Your Honor.

THE COURT: And I don't know that I will utilize it exactly as you submit it, but it will be, at least, a basis for it.

MR. LONDRIGAN: I am used to that, Your Honor.

THE COURT: All right. Fine.

Now, that having been said, Miss McNaught, would you please make your oral motion at this time so the record is fleshed out?

MS. McNAUGHT: Your Honor, I also would make a [615] motion for the rule of the—for judgment as a matter of law.

THE COURT: All right. And that's on behalf of—.

MS. McNAUGHT: Marty Winston and the West Central Illinois Task Force.

THE COURT: Very well. And I, however, will deny those motions at this time. It seeks to me that we have adequate evidence in here that it becomes a question of

fact for this jury. And I think that I would be overstepping my prerogatives and would be violating the standard that I am held accountable to here.

So, consequently, those motions are denied. And if you would like to just file a short written motion as to each, it might be wise, to flesh out the record.

MS. McNAUGHT: I do have a question about Marty Winston. We have asserted qualified immunity on his behalf, and I believe that is a question only for the Court.

THE COURT: That's still a viable one.

MS. McNAUGHT: Okay.

THE COURT: I understand that.

MS. McNAUGHT: Thank you.

[840] As I said, it's not a perfect system, but it certainly is fair. As fair as we can make it. And it would not be possible to do it without your assistance, and your help, and your determination of facts, and reaching conclusions, as citizens and human beings.

And we are very grateful, indeed, for your time, and your effort, and the inconvenience that it has caused each one of you. So, you have our gratitude.

I, again, express my appreciation to counsel for their cooperation, and also for their courtesy extended to the Court. That is the end of the duties, ladies and gentlemen, upon your part. And we are grateful, indeed. I hereby discharge you, as the jury in this cause. And don't call us, we'll call you. And I am sure that that will take place at some future moment.

And I hope that the food at Saputos was all right. Did it meet with your satisfaction tonight? Very good. Very good. All right.

Thank you, counsel, very much. And, I think, we have nothing else at this time, do we?

MS. McNAUGHT: Your Honor, for the record, I would make a motion for judgment notwithstanding the verdict.

THE COURT: And, for the record, I will deny it.

[Filed March 5, 1992]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 88-3093

KERRY L. MALTBY,

Plaintiff,

vs.

DEWAYNE BOND, SHERIFF OF SCHUYLER COUNTY, ILLINOIS, MARTY WINSTON, and WEST CENTRAL ILLINOIS TASK FORCE,

Defendants.

MOTION FOR JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, FOR A NEW TRIAL

Now comes defendant, Marty Winston, by his attorney, Roland W. Burris, Attorney General of the State of Illinois, and, pursuant to Rule 50 of the Federal Rules of Civil Procedure, hereby renews his motion for judgment as a matter of law or, alternatively, prays that this honorable Court grant him a new trial.

In support thereof, it is stated:

1. The evidence at trial established that probable cause existed for the arrest of plaintiff.

2. Even if probable cause did not exist for the arrest of plaintiff, defendant is protected by qualified immunity.

3. It was error to submit the question of qualified immunity to the jury.

4. The jury was improperly instructed.

____ALLOWED
X DENIED /s/ Richard Mills
3/10/92 U.S. District Judge

Supreme Court, U.S.
FILED
MAY 24 1995
CLERK

No. 94-1339

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

**KERRY L. MALTBY,**

*Petitioner,*

v.

**MARTY WINSTON, WEST CENTRAL ILLINOIS TASK FORCE, and DEWAYNE BOND, Sheriff of Schuyler County,**

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENT MARTY WINSTON'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Does a court of appeals employ a *de novo* standard of review when reviewing a trial court's denial of a motion for judgment as a matter of law involving the question of whether a constitutional right to be free from arrest without probable cause is clearly established such that a police officer who provides information in order to obtain an arrest warrant is entitled to qualified immunity?

2. Did the court of appeals in this matter consider all relevant precedent in finding that the police officer was entitled to judgment as a matter of law on the basis of qualified immunity?

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No. 94-1339

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

---

**KERRY L. MALTBY,**

*Petitioner,*

v.

**MARTY WINSTON, WEST CENTRAL ILLINOIS TASK FORCE, and DEWAYNE BOND, Sheriff of Schuyler County,**

*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENT MARTY WINSTON'S BRIEF IN OPPOSITION

## JURISDICTION

The Court of Appeals for the Seventh Circuit entered its judgment on September 14, 1994 (App. 33). A timely petition for rehearing was denied on November 4, 1994 (App. 45). The Petition was filed in this Court on February 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

### Factual Background

On June 4, 1987, a covert investigation was conducted by agents of the West Central Illinois Task Force, a multi-jurisdictional law enforcement agency established primarily to combat the illegal sale and purchase of drugs on a state-wide basis (R. Doc. 218, p. 2). That day, Inspector Marty Winston, a Task Force agent, received a tip from Anthony Hankins, a confidential source, who had become an informant with the Task Force in April of 1987 and had supplied information in three other undercover drug transactions in late 1986 and early 1987 (Tr. 29). Winston considered Hankins a reliable source based on the accuracy of the prior information provided by him and based on information given to him by the state Department of Criminal Investigation (Tr. 125, 281-282, 582).

Hankins told Winston that a man named Kerry Maltby would be at the Dairy Queen in Rushville, Illinois, at approximately 6:00 p.m. in a brown Ford prepared to sell drugs (Tr. 128, 198). Hankins knew Maltby personally (R. Doc. 72, Exhibit A, p. 13). Winston reported this information to his supervisor, Sergeant Kempf, who was to be the supervisor of the undercover drug purchase (Tr. 191-192, 279-280).

The Task Force agents arranged for Inspector Sage, the undercover agent, to pick up Hankins at 6:00 p.m. in Rushville (Defendant's Exhibit 3, p. 2). The agents did not plan to arrest Maltby after the transaction, because they hoped to conduct more drug transactions with him (Tr. 47, 201-202). Delayed arrest was the method most frequently used by the Task Force in its undercover drug investigations (Tr. 94, 229). After Inspector Sage picked

up Hankins, Sage advised the agents that he and Hankins were to meet Kerry Maltby at the Dairy Queen parking lot and that Maltby was going to be driving a brown Ford (*Id.*).

The agents conducting surveillance observed the undercover vehicle pull into the Dairy Queen lot and park next to a brown Ford with a male inside (*Id.*). Inspector Winston was positioned in surveillance approximately 200 feet from the parked vehicles (Tr. 45). Inspector Sage left his car and approached the brown Ford (Tr. 161). Hankins introduced the person in the Ford to Sage as "Kerry" (Tr. 191). Through the car window, Sage viewed Maltby's face, the front portion of his body and his arms (Tr. 160-162). Sage purchased what purported to be LSD and inquired about purchasing marijuana (Tr. 164-165, 196). During the approximately thirteen minutes of the undercover purchase, Maltby never left the brown Ford (Tr. 160-161).

After the transaction, the brown Ford left the Dairy Queen parking lot and drove past Inspector Winston in his surveillance position (Tr. 133-134). At a distance of approximately thirty feet, Inspector Winston observed the driver of the brown Ford as he slowly drove by (Tr. 127, 134, 582). Within the hour, Inspector Sage met with Task Force agents and showed them what purported to be 1.1 grams of LSD and informed the agents that the purchase had been made from Kerry Maltby (Tr. 583-584). Winston later learned that the brown Ford was registered to Virgil Riley of Beardstown, Illinois (Plaintiff's Exhibit 24, p. 2).

Between June 5 and 8, 1987, Chestnut, a suspect involved in prior marijuana purchases set up by Hankins with the Task Force, contacted Inspector Sage in his undercover capacity to arrange a drug purchase (Tr. 168). Chestnut told Sage that if the drug sale took place, he intended to attempt to split the money from the sale with

Hankins (Tr. 170). Inspector Sage did not believe what Chestnut said about Hankins, but he informed the Task Force of his comments (Tr. 179, 207). If Hankins ever was to receive money in such an undercover transaction, it would have violated his confidential source agreement with the Task Force (Tr. 55).

On June 8, 1987, the final undercover purchase with Chestnut was scheduled to take place, after which the Task Force planned to arrest him (Tr. 49). Prior to the arrest, Inspector Winston told Hankins of Chestnut's intended attempt to split the money with Hankins (Tr. 50, 53). The day of Chestnut's arrest, Hankins did not participate in the transaction or the arrest and left town (Tr. 56-57).

Because Hankins was no longer available to set up undercover drug purchases with Maltby, it became clear that no further purchases could be made as planned (Tr. 56). Therefore, Winston brought Maltby in for questioning regarding the Dairy Queen incident hoping to convince him to become an informant (Tr. 62-63). At the meeting, Maltby denied knowledge of the Dairy Queen transaction and declined to be an informant (*Id.*).

Approximately one week later, on August 6, 1992, after consulting with Sergeant Kempf, Inspector Winston provided information on the Dairy Queen incident to the State's Attorney in order to obtain a warrant for Maltby's arrest (Tr. 65-66, 109, 544, 548-549, 585). Winston's application was based upon his own observations of the Dairy Queen transaction, the information supplied by the confidential source, Inspector Sage's incident report, and Winston's identification of Maltby the week before (Tr. 23, 585).

The State's Attorney presented this information to a circuit court judge, who, finding probable cause that a

crime had been committed by Maltby, issued a warrant for his arrest (Tr. 545). On August 7, 1987, Maltby was arrested pursuant to that warrant by non-Task Force officers (Tr. 24-25, 109, 559, 584).

At the preliminary hearing, the State's Attorney, as was her practice, called only one police officer to testify to establish probable cause (Tr. 528). Inspector Winston testified that he got a good look at the man who sold Inspector Sage the purported LSD and that man was the defendant, Kerry Maltby (R. Doc. 72, Exhibit A, p. 14). Although three people were present at the hearing who sought to provide an alibi for Maltby, his counsel presented no witnesses (Tr. 385-386). The circuit court found probable cause to hold Maltby over for trial on the charges (Defendant's Exhibit 3).

After the preliminary hearing, Maltby's attorney and the State's Attorney spoke briefly, and the State's Attorney was advised of the alibi witnesses (Tr. 532). She then requested Inspector Winston to check out the witnesses' statements in preparation for trial (Tr. 74-75, 533). Some time later, Inspector Winston interviewed one of the witnesses, who said that Maltby had been working for him the day of the Dairy Queen incident (Tr. 75). The inspector prepared no written report of the statements, and the State's Attorney received no report (Tr. 75, 539).

At a pre-trial conference, Maltby declined a plea bargain, and the case went to trial (Tr. 535-536). On October 6, 1987, in preparation for trial, Inspector Winston requested Inspector Sage to view a mug shot of Maltby (Tr. 148-149). Due to the poor quality of the photograph, however, he could not discern whether the photo was of the man from whom he bought the purported controlled substance at the Dairy Queen (Tr. 148-149, 150). Inspector

Sage requested to view the suspect in person at the jail (Tr. 540).

Inspector Winston then went to the State's Attorney's office to advise her of Sage's request (Tr. 539). According to the State's Attorney, prior to October 6, 1987, "there was never any information that there was any wrongful identification of Mr. Maltby." (Tr. 540).

After Winston's meeting with the State's Attorney, the inspectors went directly to the Fulton County jail so that Sage could view Maltby in person through a one-way glass (Tr. 150, 539-540, 542, 548). Upon viewing Maltby for approximately three seconds, Inspector Sage told Inspector Winston that Maltby was not the man from whom he had bought the purported drugs in the Dairy Queen parking lot (Tr. 153-154). Sage stated: "I couldn't swear that was the individual I bought it from, so I would have to say no, it wasn't." (Tr. 154). Sage observed that the suspect in the Dairy Queen transaction had acne and no tattoos on his arms, whereas Maltby had tattoos but no acne (Tr. 151-152).

On the same day, Inspector Winston notified the State's Attorney of Sage's lack of identification (Tr. 548). The State's Attorney telephoned the judge, who authorized her to contact the jail and effect Maltby's immediate release (Tr. 26-28, 110, 548).

**Trial Court Proceedings**

Maltby filed this action for false arrest and false imprisonment in violation of his constitutional rights under 42 U.S.C. § 1983 against Schuyler County Sheriff Dewayne Bond, the Task Force, and Marty Winston (R. Docs. 1, 33). The trial court later denied Inspector Winston's mo-

tion for summary judgment on the issue of qualified immunity (R. Docs. 71-72, 135, 159).

At the close of Maltby's case in chief, the trial court granted Sheriff Bond's motion for judgment as a matter of law (Tr. 614). On the same date, Inspector Winston and the Task Force also moved for judgment as a matter of law (Tr. 614-615). Inspector Winston also raised his claim to qualified immunity; however, the court denied the motions because "[i]t seems to me that we have adequate evidence in here that it becomes a question of fact for this jury." (Tr. 615). Winston's counsel stated that she believed the question of immunity was "only for the Court." (*Id.*). In response, the court stated "That's still a viable one." (*Id.*).

After closing arguments of counsel, the court submitted the instructions to the jury (Tr. 689-703). The court instructed the jury, *inter alia*, that:

> The issue of a warrant for Plaintiff's arrest protects Defendants from liability unless a reasonably well-trained police officer in Winston's position would have known that his affidavit or testimony failed to establish probable cause, and that he should not have applied for the warrant.

(Tr. 693-694).

The jury returned verdicts in favor of Maltby and against Inspector Winston and awarded Maltby $50,000 in compensatory damages and $2,300 in punitive damages (R. Docs. 222-223, 226-227). On March 5, 1992, Winston moved for judgment as a matter of law, or in the alternative, for a new trial (R. Docs. 230-231). Winston argued that the evidence established at trial demonstrated the existence of probable cause, that even if there was no probable cause, Winston was protected by the doctrine of qualified immunity, that the court committed error in sub-

mitting the qualified immunity question to the jury, and that the jury had otherwise been improperly instructed (R. Doc. 230). The motions were denied by the court on March 10, 1992 (*Id.*).

**Decision Of The Court Of Appeals**

The court of appeals found that, "[a]lthough the standard of review is certainly not outcome determinative, we believe that the issue of whether a constitutional right to be free from arrest without probable cause, is clearly established in a sufficiently particularized manner is a question of law we review de novo." (App. 12). The court analyzed other Seventh Circuit cases that had held that the standard of review for denials of qualified immunity when probable cause is at issue is clearly erroneous and found that those cases did not comport with rulings of this Court (App. 12-14 n.7). The court of appeals explicitly stated that its opinion did not address the issue of whether the trial court erred in instructing the jury on qualified immunity (App. 18 n.12).

Looking at what was known to Inspector Winston at the time he applied for the warrant, the court found that the following facts supported a finding that Maltby was the person who sold the look-alike substance to Inspector Sage: Hankins' statement that the man selling the drugs would be Kerry Maltby; Hankins' information that the seller would arrive in a brown Ford; Winston's observation of a male parked in a brown Ford in the Dairy Queen parking lot; Hankins' introduction of the man as Kerry; Winston's observation of the undercover purchase; Winston's observation of the man in the Ford driving past him; Inspector Sage's report of purchasing LSD from Kerry Maltby; and Winston's viewing of Maltby face-to-face after the incident (App. 14-15).

The court of appeals found that it was incumbent upon Maltby to prove that it was readily apparent to Inspector Winston, given the law of probable cause in existence at the time, that his actions were unlawful (App. 17). The court concluded that Inspector Winston was entitled to qualified immunity because a reasonable police officer in Winston's position could have determined that Maltby committed the crime (App. 17-18).

## REASONS FOR DENYING THE WRIT

### I.

### A *DE NOVO* STANDARD OF REVIEW IS PROPER BECAUSE THE TRIAL COURT'S DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW RAISES ONLY A QUESTION OF LAW

Following the jury trial, Inspector Winston moved for judgment as a matter of law on the basis of qualified immunity (R. Docs. 230-231). The district court denied the motion (*Id.*). It is well settled that the trial court's resolution of a motion for judgment as a matter of law raises only a question of law, which is subject to *de novo* review. *Henderson v. DeRobertis*, 940 F.2d 1055, 1057 (7th Cir. 1991); *David Copperfield's v. Haddon Advertising Agency*, 897 F.2d 288, 291 (7th Cir. 1990).

The *de novo* standard of review is appropriate on review of the disposition of a post-trial motion for judgment as a matter of law because the district court was in no better position than the court of appeals in determining the merits of such a motion. *Rakovich v. Wade*, 850 F.2d 1180, 1187-1188 (7th Cir. 1988), *cert. denied*, 488 U.S. 968 (1988) (when the issue of qualified immunity arises in the judgment notwithstanding the verdict context, the district court should consider all the undisputed evidence in the

light most favorable to the non-movant and so must the appellate court). Both courts apply the same legal standard: "whether the evidence presented, combined with all the reasonable inferences permissibly drawn therefrom is sufficient to support the verdict in a light most favorable to the party against whom the motion is directed." *Webb v. City of Chester*, 813 F.2d 824, 827-828 (7th Cir. 1987).

Petitioner's claim that a more deferential standard of review should be used where the underlying question is that of qualified immunity is simply incorrect. *See Whiting v. Kirk*, 960 F.2d 248, 250 (1st Cir. 1992) (on review of the denial of a motion for judgment notwithstanding the verdict, the court of appeals stated that the determination of whether or not a party is entitled to qualified immunity is a legal decision that is reviewed on a plenary standard). Given the procedural posture of this matter, the court of appeals' use of the *de novo* standard of review was entirely proper.

## II.

## THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT THE ULTIMATE ISSUE OF QUALIFIED IMMUNITY IS A QUESTION OF LAW SUBJECT TO A *DE NOVO* STANDARD OF REVIEW

Finding that "[a]lthough the standard of review is certainly not outcome determinative," the court of appeals employed a *de novo* standard of review to determine whether a constitutional right to be free from arrest without probable cause is clearly established in a sufficiently particularized manner (App. 12). The court correctly concluded that Winston was entitled to qualified immunity because "a reasonable officer in Inspector Winston's position, looking to our case-law on probable cause generally, could have concluded that Mr. Maltby committed the crime." (App. 17-18).

The court correctly found that qualified immunity is a question of law that is reviewed *de novo*. Recently, this Court held that whether "an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law not one of 'legal facts.' " *Elder v. Holloway*, ____ U.S. ____, 114 S. Ct. 1019, 1023 (1994). "That question of law, like the generality of such questions, must be resolved *de novo* on appeal." *Id.; see also Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (application of the general rule of qualified immunity requires a determination of whether the government agent could, as a matter of law, have reasonably believed that his actions were unlawful in light of clearly established principles).

Petitioner has cited no support for his assertion that the determination of the existence of a clearly established right somehow changes from an issue of law to an issue of fact merely because some factual disputes concerning qualified immunity may need to be resolved. Qualified immunity remains a matter of law whether the district court decides the issue on a motion for summary judgment or after the trial on a motion for judgment as a matter of law, as recognized by the trial court when it found that qualified immunity was "still a viable" issue (*See* App. 6-7 n.3).

### A. The Court Of Appeals' Finding That The Standard Of Review Was Not Outcome Determinative Shows That The Writ Should Not Be Granted

Where the court of appeals found that the standard of review was "certainly not outcome determinative," this case simply does not present issues to be resolved by this Court (*See* App. 12). This Court has cast doubt upon the

efficacy of determining whether an issue is one of fact or law for standard of review purposes. *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) (defining issues as questions of law or fact to determine the scope of appellate review "is often not an illuminating test and is never self-executing"). The Court also has noted the "vexing nature of the distinction between questions of fact and questions of law" and has not yet established a "rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Thus, although the appellate court determined that qualified immunity was a question of law subject to *de novo* review, the implication that the court would have reached the same result on these largely undisputed facts using a deferential standard indicates that the court's decision need not be disturbed.

**B. The Court Of Appeals Did Not Address The Issue Of Whether The Trial Court Erred In Instructing The Jury On Qualified Immunity. As Such, The Court's Decision Is Not Representative Of A Conflict In The Circuits Regarding The Role Of The Jury In These Types Of Cases**

Petitioner's contention that this case is representative of a "raging" conflict among the circuits as to the extent of the jury's involvement in deciding the issue of qualified immunity ignores the fact that the court of appeals did not address this issue (Petition at 15). Although Inspector Winston argued on appeal that the jury should not have been instructed on qualified immunity, the court of appeals explicitly declined to reach this issue (App. 18 n.12). Furthermore, Petitioner did not delineate in the briefs he filed below the theory that he now advances regarding a conflict among the circuits as to the role of the jury in cases involving qualified immunity. For example, in his petition for rehearing he claimed only that the court

of appeals' decision conflicted with Seventh Circuit case law, which had held that the appellate court should use a clearly erroneous standard of review regardless of whether judge or jury determines the immunity issue.

The absence of any analysis of the issue by the court of appeals stands in stark contrast to those cases that have dealt with this complex issue, which implicates concepts of federalism, judge-jury relations, and § 1983 policy. *See, e.g., Oliveira v. Mayer*, 23 F.3d 642, 648-650 (2nd Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S. Ct. 721 (1995); *Sloman v. Tadlock*, 21 F.3d 1462, 1466-1469 (9th Cir. 1994); *Warren v. Dwyer*, 906 F.2d 70, 75-77 (2nd Cir. 1990), *cert. denied*, 498 U.S. 967 (1990). "A wise exercise of the powers confided in this Court dictates that we reserve for another day" questions that have not been pressed or passed upon below. *Illinois v. Gates*, 462 U.S. 213, 224 (1983).

### C. The Court Of Appeals Correctly Found That Prior Seventh Circuit Case Law Did Not Comport With Rulings Of This Court

In *Malley v. Briggs*, 475 U.S. 335, 345 (1986), the Court created room for an immunity defense even where probable cause was lacking when it stated that the question is "whether a reasonable well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause . . . ." In *Hunter v. Bryant*, 502 U.S. 224, 228-229 (1991), the Court found that even if the public official errs in concluding that probable cause exists for an arrest, qualified immunity may apply if the decision to arrest was reasonable even if mistaken.

Petitioner's contention that the appellate court misinterpreted *Malley* and *Hunter* is untrue (Petition at 15-18). His reference to the appellate court's reliance on *Malley*

and *Hunter* neglects to mention the context within which the court discussed these cases. The appellate court acknowledged that the court in *Mahoney v. Kesery*, 976 F.2d 1054 (7th Cir. 1992), had reviewed the question of immunity using a clearly erroneous standard. The appellate court examined *Mahoney* in light of *Malley* and *Hunter* and correctly concluded that *Mahoney* was inconsistent with the rulings of these cases.

In *Mahoney*, the Seventh Circuit found that "[w]hoever makes the finding of probable cause (judge or jury), we do not review it *de novo*." *Mahoney*, 976 F.2d at 1059. The *Mahoney* court stated that the deferential standard was appropriate because when a section 1983 action centers on the existence of probable cause, the question of immunity merges with the merits. *Id.*

In rejecting the *Mahoney* reasoning and considering it a departure from existing law, the court of appeals stated that *Mahoney* did "not adequately take into account the Supreme Court authority which is binding upon this court." (App. 12-14 n.7). Citing to *Malley* and *Hunter*, the court of appeals found that the Court suggested a bifurcated analysis, i.e., an inquiry into qualified immunity separate from that of probable cause.

The court of appeals found that *Mahoney* was inconsistent with *Malley* and *Hunter* in that *Mahoney* determined that probable cause and qualified immunity merged and that the clearly erroneous standard was appropriate. The appellate court's conclusion that probable cause and qualified immunity are distinct inquiries is proper. *See Anderson*, 483 U.S. at 641 (objective reasonableness component of a Fourth Amendment violation is distinct from the objective reasonableness component of a qualified immunity defense); *Mitchell v. Forsyth*, 472 U.S. 511, 527-528 (1985) (a claim of immunity is conceptually distinct from

the merits of the plaintiff's claim that his rights have been violated). Neither *Malley* nor *Hunter* suggests that a qualified immunity determination should be reviewed on any standard other than *de novo*, contrary to Petitioner's assertion.

## III.

## THE COURT OF APPEALS CONSIDERED RELEVANT CASE LAW IN CORRECTLY DETERMINING THAT WINSTON WAS ENTITLED TO QUALIFIED IMMUNITY

Government officials, such as police officers, are "generally shielded from liability for civil damages as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The contours of the right must be sufficiently clear that a reasonable official would understand that his actions violate the right. *Anderson*, 483 U.S. at 640.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Where a public official's duties require action in which clearly established rights are not implicated, the public interest may be better served by action taken without fear of consequences. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Such "consequences" include liability for monetary damages and the "general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 525-526, quoting *Harlow*, 457 U.S. at 816.

The decisive fact is not that the official's position turned out to be incorrect, but that the question was open at the time he acted. *Mitchell*, 472 U.S. at 535. The court

should ask "whether the [government] agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . after the fact." *Hunter*, 502 U.S. at 228. Probable cause exists if " 'at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing' " that a crime had occurred. *Id.*, quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

The court of appeals believed that a reasonable officer in Inspector Winston's position could have concluded that Maltby committed the crime "looking to our case-law on probable cause generally." (App. 18). Petitioner has not shown that the law was clearly established in a particularized manner in relation to the facts of this case.

Although Petitioner contends that the law was clearly established that information readily available to the police officer that negates the issue of probable cause is relevant in determining if the officer's determination is objectively reasonable, Petitioner fails to explain what information was readily available to Winston at the time of the arrest that would have negated probable cause or why. (Petition at 20-22). In any event, the cases he cites involve situations where the information available to the officers was essential to the determination of whether a crime had even been committed. They have no application to this case.

Petitioner also argues that the law was clearly established that the identity of the suspect must be confirmed promptly when an arrest is not made at the scene of the crime. (Petition at 22-24). The record showed that Winston, who was parked 200 feet from the car at the Dairy

Queen and saw the driver of the car at a distance of 30 feet when it went past him at a slow rate of speed, had no doubts about Maltby's identity when he sought the arrest warrant. Inspector Winston had been told by Inspector Sage that the undercover purchase had been made from Kerry Maltby. In addition, Winston brought Maltby in for questioning approximately one week before the arrest and, thus, had seen him face-to-face. The facts of this matter distinguish the case from that of *Tillman v. Coley*, 886 F.2d 317, 318 (11th Cir. 1989), *reh'g denied*, 893 F.2d 346 (11th Cir. 1989), where the arresting officer did not witness the transaction and failed to inform the magistrate who issued the warrant of his doubts about the identity of the suspect. Inspector Winston never expressed doubts about the identity of Maltby.

Petitioner also asserts that the law was established regarding probable cause in cases based on reliance on informants and that Inspector Winston should have investigated the information provided by Hankins. (Petition at 24-26). Probable cause is based upon the totality of the circumstances, such that any questions regarding reliability may be counteracted by other evidence. *Illinois v. Gates*, 462 U.S. 213 (1983). Hankins had provided accurate information in other undercover drug transactions, and the transaction at the Dairy Queen occurred almost exactly as Hankins indicated it would. Additionally, Inspector Winston was told by personnel at the state Department of Criminal Investigation that Hankins was a reliable informant. The fact that Hankins left town at a point after he was confronted with information that he was involved in illegal activity does not negate Winston's reliance on the information provided by Hankins, where the events occurring in the Dairy Queen transaction took place as Hankins indicated.

Petitioner acknowledges that selling a look-alike substance is a crime, but contends that this was a crime of such a "trivial nature" that Winston should have investigated his subjective belief as to the identity of the suspect prior to the arrest. (Petition at 26). The fact that the gravity of the offense is a consideration in the probable cause analysis when a police officer has arrested a suspect without a warrant distinguishes this case from those cited by Petitioner. *See BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986); *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985).

Petitioner's claim that the appellate court "jettisoned" his presumption of innocence is simply frivolous. (Petition at 26-27). The Constitution does not guarantee that only the guilty will be arrested. *Baker v. McCollan*, 443 U.S. 137 (1979). The qualified immunity standard itself "gives ample room for mistaken judgments . . . ." *Malley*, 475 U.S. at 343. The court's opinion no more damages the presumption of innocence than does, for example, an indictment or a similar finding at a pre-trial hearing.

Although acknowledging that probable cause is determined at the moment the arrest is made, Petitioner argues that post-arrest evidence is relevant in this matter. (Petition at 27-28). Petitioner cites *Whitley v. Seibel*, 613 F.2d 682 (7th Cir. 1980), which holds that a police officer who intentionally misleads or misrepresents facts and circumstances to the prosecuting attorney can be found to have deprived the arrestee of liberty without due process of law. (Petition at 28). He also cites to *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988), which found that a police officer applying for a warrant may be liable where the evidence shows that the officer "systematically concealed from the prosecutors, and misrepresented to them, facts highly material to . . . the decision whether to prosecute . . . ." (*Id.*).

Petitioner's claim that *Whitley* and *Jones* constitute the clearly established law in this matter is erroneous. Petitioner argues that Inspector Winston failed to inform the State's Attorney that Inspector Sage had not viewed Maltby until the day of his release; however, Petitioner makes no claim, and indeed cannot, that Inspector Winston intentionally misled or systematically concealed information from the prosecutor.

Without citation to authority, Petitioner contends that Inspector Winston violated a clearly established constitutional right by failing to check with the "main eyewitness" in the case. (Petition at 28-29). As the court of appeals correctly noted, an officer who had witnessed a purported drug transaction and who had made an identification "could easily rationalize the shortcomings of the evidence; such a lapse at most reveals a mistake in judgment." (App. 16). This Court has recognized that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials . . . should not be held personally liable." *Anderson*, 483 U.S. at 641.

For purposes of qualified immunity, the decisive fact is not that the officer's "position turned out to be incorrect, but that the question was open at the time he acted." *Mitchell*, 472 U.S. at 535. The court of appeals correctly found that a reasonable officer in Inspector Winston's position could have concluded that Maltby committed the crime "looking to our case-law on probable cause generally . . . ." (App. 18). Petitioner has not shown that the court of appeals erred in finding Inspector Winston entitled to qualified immunity. There is no basis of error warranting this Court's review.

## CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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Supreme Court, U.S.
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No. 94-1339

In The

# Supreme Court of the United States

October Term, 1994

KERRY L. MALTBY,

*Petitioner,*

v.

MARTY WINSTON, WEST CENTRAL ILLINOIS TASK FORCE, and DEWAYNE BOND, Sheriff of Schuyler County,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## REPLY AND SUPPLEMENTAL BRIEF

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## I. THE APPELLATE COURT DID NOT APPLY THE PROPER STANDARD OF REVIEW TO THE DENIAL OF WINSTON'S J.N.O.V. MOTION.

Winston attempts to justify the Appellate Court's decision to apply a de novo standard of review by arguing it was proper as part of the Appellate Court's review of the denial of Winston's J.N.O.V. Motion after the jury trial. This attempt is improper for two reasons.

First, this argument is not supported by the opinion. The Appellate Court never stated its de novo standard of review was based upon its review of Winston's J.N.O.V. Motion. In fact, the Appellate Court never identified the aspect of the trial court proceeding in which it believed reversible error occurred. It is obvious based on the jury's award of $2,300 of punitive damages to Maltby, which the trial court did not disturb, that the jury viewed Winston's conduct as egregious. However, the Appellate Court did not make any reference to the import of the jury's punitive damage award in its analysis. The Appellate Court simply proclaimed its belief as to the actions of a "reasonable police officer" and that Winston's actions were at most "a mistake in judgment" and reversed the jury's verdicts without any explanation as to why the jury and trial judge's contrary view was wrong (App. 14-16). Although not explicitly stated by the Appellate Court, the lack of reference or deference to the trial court findings is indicative of a de novo standard of review of the issue of qualified immunity as a pure legal issue.

Second, assuming arguendo, that the Appellate Court meant to review the trial judge's denial of Winston's

J.N.O.V. Motion, it failed to apply the proper J.N.O.V. de novo standard of review which, as noted by Winston, requires *all* evidence to be viewed in the light most favorable to the prevailing party. *Henderson v. DeRobertis*, 940 F.2d 1055, 1057 (7th Cir. 1991). The Appellate Court attempted to explain away evidence that favored Maltby (App. 15-17) and paid no deference to the jury's verdicts whatsoever. Furthermore, the Appellate Court's determination as to a "mere mistake in judgment" is at odds with the record. Winston did not acknowledge any mistake at trial and still claimed he was right about his identification of Maltby (Pet. 9). In addition, the Appellate Court did not make any reference to the evidence which showed that:

> 1) a reasonable police officer in Winston's position should have checked his belief regarding Maltby's identification with Winston's fellow officer, Sage, as part of Winston's investigation of the case (Pet. 9-10);
>
> 2) Winston ultimately decided to check Maltby's identity with Sage after Maltby had been in jail for 60 days because Maltby wasn't "pleading out" (Pet. 4);
>
> 3) Winston's actions were a flagrant violation of police procedure in the opinion of Maltby's expert witness (Pet. 10);
>
> 4) Winston was told by his supervisor to follow up on the variance between the registration of the car used in the Dairy Queen transaction and the name "Kerry Maltby" before Maltby's arrest but, Winston did not do so (Pet. 7-8);

5) an intelligence file indicated the owner of the car used in the Dairy Queen transaction was engaged in drug sales and the statements made by the suspect in the Dairy Queen transaction about growing marijuana were consistent with that information (Pet. 7);

6) the informant had been implicated in drug purchases and agreed to serve as an informant in the hope of lessening his punishment (Pet. 7);

7) the informant's failure to maintain contact with Winston prior to Maltby's arrest was a violation of the informant's duty as an informant (Pet. 3); and

8) criminal charges were filed against the informant prior to Maltby's arrest (Pet. 3).

Based on these glaring omissions, Winston cannot seriously argue that the Appellate Court applied the traditional de novo standard of review to the denial of his J.N.O.V. Motion. It is clear based upon a review of the opinion that the Appellate Court utilized a do novo standard of review of the qualified immunity issue as a pure legal question without considering the evidence it chose to discuss in the light most favorable to the prevailing party and omitted altogether important facts that favored the prevailing party at trial, Maltby.

## II. THE STANDARD OF REVIEW WAS OUTCOME DETERMINATIVE.

Winston claims review by this Court is not warranted because the Appellate Court stated the standard of review was not outcome determinative (App. 12).

Although admittedly, that is what the Appellate Court said, the form of its opinion belies that assertion. The Appellate Court included a lengthy analysis that encompassed parts of three pages of its opinion in Footnote 7 in defense of its de novo standard of review even though it was not "outcome determinative" (App. 12-4). In that footnote, the Appellate Court attempted to cloak its decision in the authority of this Court by citing *Malley v. Briggs* and *Hunter v. Bryant* and purported to speak for this Court even though the standard of review was not "outcome determinative".

Furthermore, this Court has recognized that an appellate court's statement about the basis for a decision does not conclusively establish it as the actual basis for the decision or prohibit Supreme Court review of the appellate court's analysis. In the case of *Pullman-Standard v Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), the appellate court reviewed the facts of the case anew and rejected the district court's findings. Late in the appellate court's opinion, it made reference to the clearly erroneous standard of review of factual issues required by Federal Rule of Civil Procedure 52(a) as the controlling standard of review. Upon review in this Court, the plaintiffs attempted to defend the appellate court's decision based on its reference to the clearly erroneous standard of review, which is the standard of review this Court ultimately adopted as the proper standard of review in that case. This Court rejected plaintiff's argument and held that the opinion "strongly suggest[ed] that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the

record." *Pullman-Standard v. Swint*, 456 U.S. 273, 290-1, 102 S. Ct. 1781, 1791, 72 L.Ed. 66, 81 (1982).

Maltby submits that this Court should draw the same conclusion about the Appellate Court's opinion in this case. The entirety of the opinion indicates it was based on the Appellate Court's wholesale reweighing of the evidence. Notwithstanding the Appellate Court's protestation to the contrary, the de novo standard of review was in actuality outcome determinative because the standard of review selected by the Appellate Court is the only standard of review that enabled it to avoid viewing the evidence in the light most favorable to the prevailing party, Maltby.

## III. THE RECORD IN THIS CASE PROPERLY PRESENTS THIS COURT WITH THE OPPORTUNITY TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO THE PROPER STANDARD OF REVIEW OF THE QUALIFIED IMMUNITY ISSUE AND THE ROLE OF THE JURY.

Winston does not deny a split in the circuits on the issues of whether qualified immunity is an issue of law or fact and the proper standard of review. Nor does he deny that this Court has not resolved these issues. Instead, Winston claims this is not the proper case to decide the issues based on the record and the Appellate Court's lack of analysis of the role of the jury. Maltby submits this assertion is wrong for several reasons.

First, there is no dispute that the jury received an instruction on the issue of qualified immunity. (T at 693-4,

Court's Inst. No. 1 R. Doc. 224). Therefore, the jury's role in deciding the issue is unquestionably of record.

Second, the Appellate Court said it was not addressing the jury instruction on the issue of qualified immunity (App. 18 n.12). However, in reality, the Appellate Court implicitly addressed the issue and determined the jury could not decide the issue of qualified immunity by adopting and applying a de novo standard of review as a pure question of law and reversing the jury's verdicts. It would be logically inconsistent for the Appellate Court to apply a de novo standard of review without any deference to the facts that favored the prevailing party at trial *and* hold at the same time it was proper for the jury to decide the issue of qualified immunity. The realm of issues to which a de novo review as a pure question of law actually applies and issues that are the proper subject of determination by a jury are mutually exclusive.

Third, the briefs adequately developed the standard of review issue and the role of the jury in deciding the issue of qualified immunity. Federal Rule of Appellate Procedure 28(a)(6) and (b)(4) requires the parties to identify the standard of review in their briefs. The parties complied with that rule. Winston devoted two pages of his Appellant Brief (Pg. 24-5) and fourteen pages of his Reply Brief (Pg. 5-18) to the standard of review issue. Maltby devoted three pages of his Appellee Brief (Pg. 33-5) to the issue. Winston argued in three pages of his Appellant Brief (Pg. 40-2) and three pages of his Reply Brief (Pg. 38-40) that qualified immunity is a question of law and the jury should not have been instructed on the issue. Maltby argued in six pages of his Appellee Brief

(Pg. 45-50) that the jury could decide the issue of qualified immunity and received proper instructions.

Admittedly, the cases cited by Maltby on these issues on appeal were by and large Seventh Circuit cases. However, as Footnote 7 of the Appellate Court's opinion demonstrates, cases from the Seventh Circuit reflected a split on these issues and the issues are still unresolved for that matter, since the Seventh Circuit has not reviewed the issues *en banc*. Winston does not claim the Seventh Circuit cases cited by Maltby are not representative of the split on the issues in cases from other circuits, which were cited by Maltby in his Petition for a Writ of Certiorari. Nothing would have been added to the record or the Appellate Court's analysis by having Maltby cite cases from other circuits in his brief or petition for rehearing. In addition, Winston's argument in essence considers the citation of individual cases to be "the equivalent of legal facts." This Court has rejected Winston's "legal facts" argument. *Elder v. Holloway*, ___ U.S. ___, 114 S.Ct. 1019, 1022-3, 127 L.Ed.2d 344, 350-1 (1994). Therefore, the standard of review for qualified immunity, the role of the jury, and the jury instructions issues were fully developed by the parties at the trial and appellate levels and provide this Court with a meaningful opportunity to address and resolve the issues.

Furthermore, Winston overlooks the fact that only this Court, not the Seventh Circuit, can conclusively resolve the conflict on the issues and establish the appropriate standard of review and the role of the jury nationwide for all litigants. Many courts have noted the confusing state of the law on the roles of the trial judge and the jury on the issue of qualified immunity. (See

*Sanchez v. Sanchez*, 777 F. Supp. 906, 914 (D.N.M. 1991); *Presley v. City of Benbrook*, 4 F.3d 405, 409 (5th Cir. 1993); and *Sloman v. Tadlock*, 21 F.3d 1462, 1466-9 (9th Cir. 1994) which was cited by Winston in his brief. (Brief 13)) The time has come to clear up this area of law. Civil rights litigants have faced the uncertainty of how the trial courts should apply the clearly established law component of the qualified immunity issue to the facts of cases and the appropriate standard of review of trial court decisions on the issue of qualified immunity long enough. This Court should resolve these issues by accepting this case for review. Otherwise, the parties, trial judges, and appellate courts will continue to drift about aimlessly like a ship without a rudder in addressing these issues and will continue to reach conflicting conclusions.

## IV. A PETITION GRANTED BY THIS COURT MAY SHED LIGHT ON THE ISSUES RAISED IN THIS PETITION.

Earlier this year, this Court granted certiorari in the case of *Johnson v. Jones*, 26 F.3d 727 (7th Cir. 1994), cert. granted, ___ U.S. ___, 115 S.Ct. 305, 130 L.Ed.2d 621 (1995). The question presented in that case is:

> "In action under 42 U.S.C. 1983, may denial of public official's motion seeking summary judgment on qualified immunity grounds because plaintiff failed to adduce any evidence showing wrongful conduct be challenged in interlocutory appeal?"

Although an interlocutory appeal is not involved in this petition, the Court's disposition of the *Johnson v. Jones*

case could illuminate the interplay between the clearly established law component of qualified immunity analyzed in *Elder v. Holloway, id.*, and the application of the clearly established law to the facts. To the extent that the Court actually addresses the role of the facts in the issue of qualified immunity in that case, it should be considered by the Court in addressing this petition, too.

## V. THE LAW WAS CLEARLY ESTABLISHED IN RELATIONSHIP TO WINSTON'S ACTIONS AND HIS ACTIONS VIOLATED THAT LAW.

Maltby's Petition included twelve pages of analysis of the issue of the clearly established law (Pet. 18-29). Winston responded with four pages on criticism of Malt by's cases (Brief 16-19). However, Winston did not offer any cases which involved the issue of probable cause and actions and omissions similar to Winston's in support of his view of the state of the clearly established law. Instead, Winston simply repeated the Appellate Court's statement that a reasonable police officer in Winston's position could have concluded that Maltby committed the crime "looking to our case law on probable cause generally" (Brief 16 and App. 18). Other than this case, where is the case law on "probable cause generally" which supports the contention that probable cause for an arrest existed in a situation in which the police received information prior to the arrest that the informant was acting in an improper fashion, the informant disappeared after being challenged with that information and remained at large at the time the arrest was made, and the officer who got a brief glimpse of the suspect at the scene applied for a warrant roughly 8 weeks after the incident without

checking his identification of the suspect with the officer who had face-to-face contact with the suspect during the transaction prior to the suspect's arrest, and failed to do so until 60 days following the suspect's arrest? The obvious answer is such "general probable cause case law" does not exist! Maltby submits Winston's failure to cite actual cases which show that Winston's actions were proper, demonstrates that the cases cited by Maltby properly represent the clearly established law and that the Appellate Court's statement to the contrary is wrong. This Court should grant this Petition, if for no other reason than to maintain a uniform body of clearly established law on the issues raised by Winston's actions and omissions, as set forth by Maltby and "deter public officials' unlawful actions and compensat[e] victims of such conduct." *Elder v. Holloway*, ___ U.S. ___, 114 S.Ct. 1019, 1023 and n.3; 127 L.Ed. 2d 344, 350 and n.3 (1994).

## VI. CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition for writ of certiorari the writ should be granted.

Respectfully submitted,

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One of His Attorneys

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